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LABOUR ARBITRATION AND INDUSTRIAL CHANGE

BY

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I must acknowledge the help of several individuals without whom the study might never have appeared. My colleague, Harry Arthurs, first taught me Labour Law, induced me to undertake this study, and made many very helpful suggestions after reading the manuscript. My father, Mr. G.B. Weiler, first interested me in Labour Law and subjected many of my own positions and proposals to very searching comment. Mr. Robert Reilly, who worked for me in the summer of 1967 as a research assistant, did much of the research into the arbitration decisions which are referred to in Chapter I. My invaluable secretary, Mrs. Ruby Richardson, typed the manuscript several times and proofread this final version. Finally, my wife, Barbara and two children, cheerfully endured a long hot summer in Toronto while I endeavoured to meet the early deadline set by the Task Force on Labour Relations.

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CHAPTER I

THE LEGAL AND SOCIAL PROBLEMS

INTRODUCTION

One of the most pressing problems faced by the institution of labour arbitration stems from the demands put to it by changing economic, technological and social conditions, and the management responses occasioned by these changes, during the term of a collective agreement. This problem is especially significant because it throws into sharp relief profound, philosophical differences concerning the proper role of the arbitrator in the administration of the collective agreement. In fact, the specific issue of whether there should be implied limitations on subcontracting has been the key battleground in the dispute between "legalist" and "activist" theories of arbitration. Hence I will focus specifically on this problem in order to evaluate each of these attitudes to the arbitral role and to enquire whether or not a tenable middle position can be stated.

The specific substantive problem of what to do about industrial change while an agreement is in effect is heightened in importance because it is the point of conflict between two significant values. On the one hand, because of the substantial gains in security and stability in a collective bargaining relationship, there is a noticeable impetus in the direction of long-term agreements. This is probably in furtherance of a statutory policy embodied in the legislative requirement of a minimum term of one year for such agreements. 1/ On the other hand, it is becoming increasingly recognized that it is impossible to foresee in advance all the labour relations problems inherent in changing industrial conditions, and that it is

undesirable to delay agreement in order to pin down, by specific language, the contractual consequences of changes foreseen from afar and only in the abstract. Hence there are important reasons why the impact of the agreement on industrial change must be ambiguous.

Management must take the initiative in ordering relations within the plant to best take account of the new demands posed by changing circumstances. Such unilateral initiative often adversely affects the interests of employees and unions who have built up certain expectations and attitudes concerning the status quo. As a result of unresolved grievances concerning these harmful effects, the arbitrator is faced with a problem which he must resolve without the aid of either the concrete intention or language of the parties specifically directed to the problem. This article is directed towards the analysis and evaluation of various roles which the arbitrator can play in such circumstances and of various changes in the social and legal milieu which could minimize the unsuitability of the institution of arbitration for resolving the conflicting demands of change.

As I stated earlier, the popular distinction is made between a passive, legalistic role for the arbitrator and an activist, creative role. I suggest that within each of these simplistic extremes quite distinctive theories about arbitration can be distinguished. At present arbitrators are being asked to develop a new industrial jurisprudence and courts are asked to recognize a new common law of labour arbitration. 2/ The possibilities for a radical shift in the direction of labour arbitration exist because of the recent change in arbitration personnel. One object of this paper is to demonstrate the legitimacy of a distinctive arbitral contribution to the elaboration of labour law. However, I am also concerned

to show that such a role renders illegitimate a wholesale theory of implied restrictions on management initiatives affecting employee rights.

MANAGEMENT'S RESIDUAL RIGHTS: CONTRASTING POSITIONS

There are various labour relations forms which are taken by management's initiative in the face of changing economic and technological circumstances. It may decide to subcontract work either within or without the plant, or to transfer work outside the bargaining unit or outside the plant covered by the agreement. It may assign work previously performed by one employee to a new or different job classification or it may vary and add to the work assigned to the individual employee. It may close down unprofitable parts of the company's operations (or even the whole of its operations), or it may relocate the plant from an unprofitable site. Finally, it may change work rules or working conditions (for instance, instituting a compulsory retirement plan) which may not affect existing jobs as much as it does the overall amenities incident to the previous plant operation.

There is an important distinction in the types of responses requested by the union from the arbitrator after these employer initiatives. In some cases unions ask for limitations placed on management's rights to initiate the change at all (for instance, to subcontract operations and lay off employees). In other cases they content themselves with a desire to obtain favourable interpretations of management's specific responsibilities, under the agreement, to those employees whose positions are altered as a result of permitted initiatives. The primary function of this paper is with the first issue and we shall deal only peripherally with the second.

How shall we describe the perspective from which these initiatives (and their effects) are viewed by the individual employee? It seems that the union position is that the signing of a collective agreement, with its usual recognition, seniority, discharge, and wage clauses, creates an inchoate property right in the job. 3/ The collective agreement sets up a system of rules which confer on the incumbent title to his usual job functions and protects his ownership rights from both encroachment and devaluation.

By contrast, management necessarily feels impelled to defend quite contradictory values which are derived from its very function. As Chamberlain has said: "management in the performance of its function is necessarily an instigator of change, a responder to change. Management is operating in an economic environment within which change is the rule. The pressures of economic competition force it to be responsive to changes that are occurring around it." 4/ Not only is this its function but management feels this is a desirable function, the chief avenue of progress beyond the status quo, although admittedly such change entails human and social costs. A realistic view of the large industrial firms may raise some doubts about the existence of competitive pressures which compel technological change without regard to such costs. 5/ In any event, it should be obvious that this view of the managerial function is quite inconsistent with the theory that employee job rights are invested with the protection of a regime of property rules sharply limiting managerial flexibility. 6/

The union joins issue with management concerning the desirability of the individual employee bearing the costs of technological or economically-motivated change where the benefits accrue to society generally. They ask

the arbitrator to find that management has no untrammelled discretion to impose this cost unfairly on the employees and require that it negotiate with, and obtain the consent of, the union to its power to make changes. Unions, of course, will give this consent only for a price (the minimization of the loss to employees), such a cost will be added to other necessary costs of the innovation, and the market will give society a much more "informed" choice of whether the innovation is worth all of its "social" costs. The allocation of the total cost of technological change to the enterprise, and thence to the consumer of the products and services of the enterprise, also minimizes the injustice of imposing the costs of technological change on individual employees who suffer its dislocating effects. 7/

How does management usually phrase its tacit assumptions about the nature and meaning of a collective agreement, which assumptions will grant it freedom to pursue the values it believes important? 8/ It argues that management begins with certain functions and prerogatives that pre-existed collective bargaining, the purpose of union bargaining is to obtain contractual limitations on these "rights"; the eventual bargain involves an exchange that is freely agreed to by very sophisticated negotiators; and that any other approach to arbitral interpretation is in conflict with the policy of free collective bargaining.

Unions unequivocally repudiate the suggestion that the pre-existing legal position is carried over into the administration of the collective bargaining agreement, to the extent that the latter does not expressly change this position. Rather, they propose quite a different set of assumptions with which the interpretation of the agreement ought to be approached in arbitration. 9/ Each of the parties begins negotiating as an equal, with no pre-existing biases in its favour. To the extent that

the explicit bargain that is reached confers rights or power on one side, it is legally permitted to enjoy them. To the extent there is no explicit mention in the contract about a certain matter, then the status quo at the beginning of the agreement, modified by practices that have been accepted during the administration of the agreement, should be the criterion for evaluating the legality of proposed employer action. This is true at least to the extent that the employer action will substantially infringe on the integrity of the bargaining unit and the proprietary rights in their jobs of the unit incumbents.

THE PRESENT STATE OF THE LAW IN ARBITRATION

At present, both arbitral and judicial doctrine in Ontario accept, with some limited reservations, the reserved rights theory as justifying management prerogative to change, unilaterally, working conditions for business reasons. This principle was originally worked out and established in the context of subcontracting cases. Here the basic philosophical assumptions have been developed concerning the approach to arbitral reasoning and decision making. Unfortunately the lines that were drawn seemed to identify a legalistic, literal interpretation of the agreement with arbitral restraint on the subcontracting issue and opposed this combination to one of active, arbitral policy making about management initiatives together with a creative interpretation of the provisions of the agreement in the light of their collective bargaining background. It is the thesis of this paper that there is no necessary identity of position on these two issues, that it is inconsistent with the proper role of the arbitrator for him to pick and choose among the various unilateral rights left to management, but that adherence by the arbitrator to the rule of law established by the agreement is quite compatible with a creative elaboration of the structure of relations established by the parties.

No real purpose is served by giving a detailed history and analysis of the doctrines relating to subcontracting. 10/ One position was identified with those arbitrators who were members of the lower court judiciary. In substantive terms it held that the collective agreement contained no guarantee of jobs for the members of the bargaining unit but rather established terms and conditions of employment if any was available. The premise on which this result was reached was full-blooded acceptance of the management right thesis. 11/ The company has been held entitled to subcontract ancillary services 12/, maintenance 13/, and essential production or services. 14/ Such contracting is legitimate whether no employee is affected 15/ or overtime opportunities are lost 16/, or men are transferred out of their job 17/, even to a lower paid job 18/, or are laid off 19/, or are already laid off. 20/ Although a reading of these cases suggests that the work involved is usually peripheral to the bargaining unit and that employee interests are rarely affected seriously, neither of these is a necessary condition to the operation of the basic principle. Its logic extends to the subcontracting of a whole operation, as has indeed been held. 21/

Equally as important a conflict between management initiative and employee job security is the field of work assignments. Again a fairly uniform pattern of decisions has emerged, favouring employer freedom, in the absence of specific protection in the agreement for an employee's "proprietary" interest in his job. The wage schedule is not such a shield against changes in work assignments since it merely gives an employee a right to question the evaluation and rate for his new job. 22/ Management can unilaterally create new classifications where reasons of efficiency or changes in production methods so require. This is true if new machines are installed 23/, even where it produces the same product in a different way 24/

and also where the required volume of a specific duty increases enough to demand a full-time employee. 25/ Even a provision that existing classifications and wage rates must be continued does not preclude creating a new job classification. 26/

Management can create new departments as well as classifications. 27/ It can also discontinue job classifications specified in the agreement in the absence of a provision that they must be continued. 28/ An employer is required to respect the wage rates related to the classification during the term of the agreement, while the job is being performed, but this does not preclude the elimination of the job itself. 29/ Some doubt must still be expressed about management's right to create new classifications out of old where specific job descriptions are attached to the old classification. 30/

Similarly management has a presumptive right to make new work assignments within a job classification and so change an employee's duties. 31/ While there remains some ambiguity about the existence of a right to shift duties between classifications in the presence of job descriptions, there is no doubt about the power to change, add to, or subtract from the actual job content of a bare classification. 32/ Needless to say, this can be rebutted by specific wording in the agreement. 33/ Finally, within a job classification that has a description, an employee's existing duties can be unilaterally amended. In Ferranti-Packard Ltd. 34/, the company assigned a man exclusively to only one of the four machines he had previously worked within his classification. This was upheld notwithstanding the fact that the employee's incentive earnings suffered substantially by comparison with his fellow employees who continued to work all four machines.

These cases have established, rather conclusively, that an employee has no implied proprietary right in the job duties he is actually performing. An employer is free to institute new work processes or machines, and new classifications for them, or to redistribute tasks among or within existing classifications in order to reorganize his work force. In addition, the bargaining unit itself has no implied claim to the work referred to in the agreement or traditionally performed by its members. An employer has the right to take tasks from bargaining unit people and give them either to supervisory personnel 35/ or members of other bargaining units. 36/ This is true even if the result is a lay-off of some of the incumbents 37/, a loss of overtime opportunities 38/, or the total redundancy of the bargaining unit job. 39/ In fact, in one case the employer was permitted to go so far as to take work performed by the unit in one geographical area and transfer it to another geographical unit. 40/

There are other forms of management initiative which drastically affect employment security. As to some of these, such as plant closings or relocation, there has never been any question about management's presumptive freedom and the issues which are arbitrated involve the interpretation of specific, agreed-to limitations on that right. 41/ A more ambiguous legal situation obtains as regards management's right to compulsorily retire employees when they reach a certain age. There seems no doubt that where such a retirement policy is part of a valid pension programme, and the employee has participated in the latter, then there is a power of compulsory retirement. 42/ It has also been held that, without a provision to the contrary, an employer can unilaterally institute a pension plan involving compulsory retirement and force all employees to be subject to its provisions. 43/ Finally, several cases have allowed employers to

apply, without discrimination, long-standing compulsory retirement practices which antedated the agreement. 44/

The key problem remaining is whether or not an employer can justify compulsory retirement as a unilaterally established policy where the above conditions do not exist and where the agreement contains provisions limiting discharge and lay-off. Even though he distinguished "retirement" from "discharge" and "lay off" (as do most of the previously-mentioned cases), the arbitrator in Rexall Drug held that the company could not. In this result, a later case, William Kennedy & Sons 45/, agreed. However, soon thereafter the same arbitrator recanted 46/, feeling obligated by a dictum in the Supreme Court of Canada decision in Canadian Car & Foundry Co. Ltd. v. Dinham. 47/ The same position was taken, again in a dictum, by the Ontario Court of Appeal in Re Sandwich, Windsor & Amherstburg Railway Co. 48/ All of these cases proceed on the assumption that compulsory retirement is not a discharge or a lay-off. A later case, Canadian Forest Products 49/, took the position that retirement was discharge but that the company institution of a retirement policy conclusively made the established age cause for discharge. The last important decision 50/ strongly disagrees that a particular age is conclusively just cause for discharge. However, it agreed that retirement is a distinctive means of losing employment, by comparison with discharge or lay-off, and management has a right to institute a compulsory retirement plan at a specified age unless in doing so it violates any of the clauses of the collective agreement. It found a violation of the seniority provision which specifically stated how seniority is to be lost and did not mention retirement as one way.

In addition, management rights also operate in areas not directly affecting job security but substantially affecting the amenities of the job. The employer has the presumptive, unilateral right to change to a continuous shift operation 51/, to declare holidays 52/, to alter work and lunch hours 53/, to cease scheduling vacations by seniority 54/, to institute use of a time-clock 55/, and to time non-incentive jobs 56/, to name some of the issues reported in the last two years. These should serve to illustrate the variety of contexts in which this fundamental conflict of values arises, between employer and union, and the unremitting logic with which the basic principle has been applied in favour of management's interest. 57/

A DISSIDENT VIEW

Quite a different view of management's rights to make changes in working conditions was proposed by a leading Ontario arbitrator, the then Professor Laskin. He began with a completely different set of assumptions about the function of the arbitrator in interpreting the agreement. 58/ The arbitrator must not presume a set of common law rights of management which have carried over into the collective bargaining relationship until and unless it has been explicitly limited by the agreement or by statute. Arbitration begins with the assumption that the parties are equal, they do not have common law rights developed in an era of individual employee bargaining, and to the extent the agreement does not explicitly deal with a particular subject, it is the duty of the arbitrator to develop a new common law of collective agreements, based on policies suited for the new era of collective bargaining.

As far as management rights and job security are concerned, a basic policy of collective bargaining is the preservation of the integrity of the

bargaining unit. 59/ Moreover, the bargaining unit is not just a collection of actual employees but rather a set of job classifications, carrying with them prima facie claims of the unit members to this work. This does not mean that a collective agreement is a complete barrier to elimination of work. The common law of arbitration might distinguish closing down departments, or even the whole of the plant, relocating the plant outside the compass of the certification order, contracting work to be done outside the plant. An arbitrator's conclusions must be based on "such implications as are necessary to give practical or business efficacy to the collective agreement". However, Laskin was ready to find in the common law of labour arbitration a bar to contracting out of bargaining unit work to be performed within the plant by the employees of the contractor. In this result he found support in a decision of another arbitrator, Judge Cross.60/ Laskin also applied his theory to the issue of work assignments to non-unit personnel which he found to be a breach of the implied duty to preserve the integrity of the bargaining unit. 61/ Evidence that his common law of arbitration also protects the interests of the employer is provided by his Algoma Steel Corp. decision 62/, which allowed contracting out of bargaining unit work in an emergency situation where no one was on lay-off and all were already working overtime.

The substantive doctrine for which Laskin contended is dead. The coup de grâce was administered in Russelsteel Limited by a not unsympathetic observer. 63/ However, the issue of the proper mode of arbitral reasoning lives on. Some still contend that the agreement should be read as nothing more than an attempt, through the literal or plain meaning of its words, to impose restraints on the pre-existing common law prerogative of management to act as it would. 64/ Such a position has not been acquiesced in

and, indeed, there are indications that it may go the same way as the "implied obligations" theory.

We will leave aside the problem of the arbitral role and concentrate for now on the substantive issue of managerial freedom and job security. The United States system is usually cited for comparative purposes and there the position is much more complicated than the "wide acceptance" of the Laskin position asserted in Russelsteel Ltd. 65/ An intermediate position accepts the basic right of management to exercise unilateral initiative despite its bargain about working conditions with its employees, as long as the implementation of this decision does not infringe specific contractual provisions. However, this presumptive power is qualified by the requirement that it be exercised in good faith, and for compelling business reasons, and with due regard for the interests of the parties. United States arbitrators have assumed the responsibility for balancing the rights and interests of the parties and have rejected the relatively extreme positions advanced by each. 66/

One of the benefits of this approach is that it has resulted in some focusing on the "labour-relations-realities" of the situation. It requires the arbitrator to note and assess the more specific interests of each of the parties in each subcontracting-type situation. Some of the distinctions that are made are as follows: 67/ first, the union is more interested in work that is permanent than temporary (emergency or one-shot construction or maintenance); it is less interested in work that is peripheral (incidental or collateral) to the unit and production process (e.g., guards, janitors, cafeteria, lawn maintenance) than in regular maintenance or, most important, basic production processes; the employer, on the other hand, is

most interested in being able to subcontract work that it is presently incapable of performing and can be made so only by additional expense (e.g., buying equipment, training or hiring new managerial and/or technical skills); it is quite interested in subcontracting work that is temporary or sporadic where it might otherwise have to carry extra staff to meet peak or emergency situations; the union finds that the most pressing grievance occurs where subcontracting either causes a layoff, or occurs during a layoff, of men qualified to perform the work (by comparison with subcontracting which simply causes loss of overtime or mere failure to expand the unit). Management's overriding interest, of course, is in the saving of costs. These savings can accrue either from sources which are neutral as regards labour relations (as economies of scale, technical or managerial know-how, and organizational and technological efficiency), or from direct savings in labour costs due to freedom from the requirements of the collective agreement. The key issue determining the validity of the "good-faith, business or economy" limitation on managerial discretion is its decision to allow or prevent managerial initiatives designed to save on labour costs instituted by the agreement where there is no desire to undermine or subvert the union's position as bargaining agent.

Although the overt arbitral role as balancer of interests does render its decision making more meaningful in industrial relations terms, it does appear to have the consequence of precluding the stabilizing effect of rules in this area. It is impossible (or at least unheard of) to go to the arbitrator for a declaratory ruling and thus the first application of this "implied obligation" theory must be made by management when deciding to make the unilateral changes. The consequences of an erroneous choice can be a harsh, retroactive, back-pay award or, even worse, an order to restore the

original operation. For these reasons there is a great value in securing the "reckonability" of legal rules. Unfortunately, the balancing role seems to result in unpredictable, ad hoc decisions, depending on the weight the arbitrator gives to the different relevant factor he finds. In fact, it is extremely difficult to think of any general rules which could be adopted by the legislature and under which the arbitrator could limit the right of management to subcontract, automate, relocate, etc., in certain defined circumstances. The only way to reduce the problems to some sort of rule appears to be to adopt the minimal limitation of "good faith" perhaps enhanced by calling the overt purpose of avoiding the wage structure (with no other independent justification) "bad faith". Unless the latter is adopted, this doctrine of "bad faith" is probably indistinguishable from the reported Canadian conception of "reserved rights". Certainly the prevailing trend of decisions in the United States is much more favourable to management freedom than is that adumbrated in Falconbridge Nickel Mines.

AN EVALUATION OF THE CONTENDING THEORIES

Before going on, some analysis and evaluation should be made of the reasons adduced for each of the three positions.

The "Reserved Rights" Theory

The first, the "reserved rights" theory is probably logically untenable because of its failure to distinguish two concepts: first, the authority or power of management, incident to its legal control over the company's assets, to dispose freely of the capital assets of the corporation; second, its privilege to direct the employees in working with and upon these capital instruments only on the terms on which the latter is willing to work. Prior

to the collective bargaining relationship the employer had no unilateral prerogative to affect the terms and conditions of employment since the employees had an equal power to refuse to agree to work on the terms he had instituted. Now that the creation of collective economic power has given them effective bargaining potential to gain some meaningful participation in the establishing of these conditions, this should not necessarily carry the inference that they can no longer effectively disagree with the terms offered by the employer. 68/

What perhaps does carry this implication is the existence of a no-strike clause in the agreement, one which is made a compulsory part of the collective agreement in Ontario. 69/ It is only because of this clause that any legal rule exists prohibiting the employees from collectively rejecting the new terms of employment now unilaterally offered to the employees. However, a good case can be made to the contrary. To enter into a collective agreement necessarily entails this prohibition on the basic employee response to changes in terms of employment. On the other hand, the raison d'être of union existence, and the whole thrust of public policy about industrial relations, is the institution of fixed-term collective agreements. Hence, it is perfectly reasonable to infer a change in the power of management to propose new terms on which the employees must work with the capital assets the employer controls.

The "Preservation of the Status Quo" Theory

However, the union position is no more logically necessary. All of the clauses that it relies on as protecting job security (e.g., recognition, wage, seniority, union security, etc.) find their primary justification elsewhere in the institution of fixed terms within which the employer-employee

relationship is to be carried on. 70/ To say that it is the tacit assumption (or "intention") of the parties at the time of the agreement to contract on the basis of the continuance of the underlying status quo, or even the continued integrity of the bargaining unit work, is simply untrue in fact. There is no doubt that in the present "climate" of industrial relations both parties are aware of the other's conflicting intentions about the unexpressed assumptions on which the agreement is to be based. 71/ Nor is it any truer to say that implied terms are necessary to fill in the gaps and ambiguities in the agreement in a way which makes it "workable". There is simply no common assumption of the parties as to what is meant by "workable". Certainly management does not concede the necessity of inferring that the employer-union-employee relationship must continue throughout the term of the agreement.

The "Implied Obligation" Theory

The only validity to the "implied obligation" theory stems from the acceptance of two propositions: (1) the arbitrator must decide the case before him on the assumption that the agreement speaks to it one way or another; (2) he is empowered to make a choice between conflicting values by putting the onus of expressing a particular result on one party and then requiring this party to buy the concession from the other. What is important to recognize is that the acceptance of these assumptions, and acting upon them, constitutes arbitration as a vehicle for the making of basic value judgments about labour-management relations as a political actor in much the same way as the Supreme Court of the United States appears to act in certain cases. 72/

However, those theorists who advocate the "implied obligation" approach seek to justify their conclusions by some type of neutral, reasoned opinion from "self-evident" premises. It appears inconsistent with the proper scope of the arbitrator's function that he merely impose his fiat on the parties. The legislature might do this in deciding to require certain terms in the collective agreement pertaining to changes in working conditions. By comparison there is a felt need on the arbitrators to write an opinion that persuades the parties that arbitration decisions are reasonably required by legitimate principles from which they must begin reasoning. We shall elaborate in the next section the reasons that give rise to this felt need.

Suffice it for now to say that no such reasoned opinion is available here. It simply is not true that the intended purpose of a union security clause or a recognition clause is mutually assumed by the parties to give the union members any type of "property" in their jobs. The union may want this but there is no doubt they know the employer does not agree. The same is true of the very existence of a collective agreement. It simply does not carry the implication of a mutual, tacitly-accepted purpose that the enterprise and its related jobs are not to be changed, in whole or in part, during its term. Its existence is sufficiently explained by the mutual commitment to regulate the relationship according to the agreement's terms while the underlying substratum of the relationship continues to exist. Hence, as Cox says:

> Unfortunately many of the most important questions of interpretation in collective bargaining are not soluble by reference to a fundamental purpose of the collective agreement—at least not in the sense in which that term is usually understood. The difficulty arises from the fact that management and labor often have conflicting objectives, and the interpretation put upon the contract may depend upon which objective is chosen as the major premise. The difficulty is especially acute in determing what area has been brought under the regime of the contract, for

> management and labor are usually in basic conflict over the size of the area of joint responsibility. Going a step further may we not say that this is the very essence of large parts of a collective-bargaining agreement? It is an armed truce in a continuing struggle, yet the armistice line has not been put on the map. 13/

When an arbitrator takes it on himself to impose a prohibition of certain types of subcontracting or technological changes, he is engaging in the equivalent of compulsory "interest dispute" arbitration and he should recognize it as such. The character of such a decision perhaps is made more striking by considering what I believe would be a much less stringent interference with management freedom, though equally obtained without management's consent. Suppose an arbitrator were to decide that the recognition clause gave management the option of refraining from subcontracting or paying any employees, who are laid off as a result, severance pay, supplementary unemployment insurance and/or job retaining benefits. Such a decision would be intuitively unacceptable to even the most "activist" arbitrator because it would be obvious that no mutual assumption, or agreed-to purpose of the parties, is available from which to reason to such a conclusion. Yet the same is true of the implied, absolute limitation on any managerial initiative which would cause a lay-off in the same bargaining unit when the fictional character of an "implied obligation" is perceived. However, the former decision is probably much more in society's interest in creating a flexible method for minimizing hardship to employees affected by necessary industrial changes. Still, the fixing of specific sums to be paid (which would be a necessary part of the decision) "smacks" too much of the legislative or the bargaining process to be acceptable as a product of arbitration.

However, one must not make the mistake of believing that this reasoning necessarily proves the management case about its "residual" rights. It is true that I have argued that unions should not be able to convince arbitrators to prohibit such managerial initiative. However, to conclude from this that management then must have the legal right to act unilaterally requires the tacit assumption by all parties concerned that whatever is not explicitly prohibited by law is necessarily permitted. Because of the acceptance of this tacit assumption, there is a belief that arbitrators must decide in favour of either union or management. Yet the management claim to residual authority is no more legally defensible than the union's claim to limit it. There has been no express legislative judgment that it ought to have this authority and certainly no union agreement that it should exist. Hence the arbitrator feels compelled to make this basic "political" decision between union and management, however inappropriate to his role. What is needed, then, is a way of preserving in a meaningful fashion the neutrality of the law concerning managerial initiative affecting the employees.

A JUSTIFICATION FOR LIMITED ARBITRAL CONTROL

For now, we will consider the ambit of present arbitral control of unilateral employer action during the term of the agreement and the justifiability of such control. As we have seen, the United States arbitrators have developed a consensus that employer action which is undertaken in "bad faith" will be contractually prohibited. Most Canadian cases also have a reference to a limitation of "bad faith". This could mean two things. First, it could mean that the employer is in breach of an implied contractual obligation if the only reason for the action adversely affecting the employees is discrimination against the latter for their union membership, or a

desire to undermine the union status and the collective agreement and thus avoid the duty to bargain collectively. Such arbitral control is a duplication of the statutory prohibition by a contractual one (with attendant benefits and problems). 74/ A good argument could also be made that such action would be a tort and enjoinable. 75/ As we saw before, the key issue raised here is whether subcontracting, whose overriding motivation is a desire to achieve business economies through wage costs lower than those agreed to under the main contract, is such bad faith. We will assess this problem later.

Second, "bad faith" might mean the negotiation of a collective agreement together with a no-strike clause at the same time as the employer is secretly planning a unilateral step, to which it knows the union will object and about which it remains silent, in order to obtain the protection of a statutory, absolute no-strike clause. The Freedman Report, discussed below, feels this type of lack of disclosure of plans made in the "open" period of the agreement, but not disclosed before their implementation in the "closed" period, is a very important problem in this area. 76/ The attitude an arbitrator should take here depends on his view of "caveat emptor" in collective bargaining, and the extent to which he believes that contractual "good faith" requires the disclosure of such future intentions where one knows it will substantially affect the negotiations (because the other party is relying on there being no such present intention and thus not raising the whole question as a bargaining issue). If courts are capable of developing neutral principles regulating the procedure of ordinary contract bargaining, perhaps so should arbitrators be capable in the narrow field of labour-management relations. 77/

Reverting now to the question of the validity of management initiatives to secure lower wage costs despite the agreement, there are conflicting considerations. On the one hand, there is no reason, from the management point of view, to distinguish between cost savings in the capital or entrepreneurial sector and those in the labour sector. As far as the latter is concerned, it is even less easy to distinguish intelligently matters of employment efficiency (more effective utilization of labour) from matters of employment economy (labour at a lesser cost). And yet, intuitively, there does seem something peculiarly repugnant about allowing the avoidance of the very provisions of the agreement to which management has acceded.

> Upon this familiar principle of contracts one might fairly conclude in the absence of other evidence that the provisions of a collective-bargaining agreement establishing wages and labor standards imply an obligation not to seek a substitute labor supply at lower wages or inferior standards. The implied promise would prohibit subcontracting for this purpose. 78/

However, one might ask again whether the arbitrator should consider himself empowered to select among the various ways in which the employer can arrange his enterprise where there is no hint of agreement to limitations on this power.

It seems to me that a more discriminating approach is feasible in arbitration in dealing with the substantive issues of management initiatives. I would reject the extreme views sometimes expressed, either prohibiting all changes in the status quo that affect the integrity of the bargaining unit unless explicit permission is given in the agreement 79/, or allowing management complete freedom in the absence of specific, explicit prohibition by the terms of the agreement. 80/ Nor would I advocate arbitral policy making, balancing the interests of both sides and laying down rules in the

"unwritten area of the agreement" as to when changes in employment conditions are or are not permitted. For institutional reasons, which I will discuss later, I do not believe it is appropriate for arbitrators to develop a common law of collective bargaining in the absence of any mutually-acceptable set of standards. However, I do believe that a purposive interpretation of provisions established in the agreement can provide some protection to the integrity of the agreement and the unit, and in a rational and defensible manner. There are several developing strands of doctrine that do fit into a pattern.

In the first place, it is clearly established that the employer's power to establish rules within the plant is limited by the discharge clause in the agreement, to the extent he wishes to enforce these rules by disciplining his employees. 81/ For instance, an employer cannot lay down a rule prohibiting an employee from subjecting himself to a garnishee, on pain of discharge. 82/ While an employer may have the right to institute compulsory random checks of lunch pails to stop thefts 83/, it does not have an unreviewable discretion to discipline an employee who does not wish to submit to such a search. 84/

Secondly, despite some earlier intimations to the contrary 85/, an employer does not have the unreviewable power to set or change the qualifications for a job in the face of the usual seniority clause. To the extent that employers use such qualifications as criteria for determining the ability to perform the job, they must be both reasonable and non-discriminatory. 86/ For instance, a qualification must be one that relates to the actual duties of the job 87/, and not such an irrelevant requirement as that a "clerk typist" be a male. 88/ Just as the discharge provision, a seniority clause

imposes on the arbitrator the duty of evaluating management's unilateral step to see whether it comes into actual conflict with the operation of this clause.

The same developments have taken place in regard to management initiatives affecting job security, whether by subcontracting or work assignments. One of the main rationales of the "implied obligation" as regards subcontracting is a fear that management can subvert the whole of the agreement simply by utilizing subcontracted labour at a lower cost. 89/ However, even in Ontario there is a consensus among arbitrators that the employer must, in good faith, make a real subcontract. The relationship between the employer and the men supplied to him by the subcontractor must not become that of employer and employee. 90/ The tests that are conventionally applied to differentiate an independent contractor from an employee are either those of tort law 91/, or of the Labour Relations Board. 92/ If they lead to a characterization of the arrangement as a contract of service with the employee 93/, rather than a contract for service with the subcontractor 94/, then the workman becomes a member of the bargaining unit, represented by the union and subject to the terms of the agreement. He must be paid the agreed-to rate and fringe benefits and, more important, his presence on the job in preference to any previous employees laid off will be subject to grievances under any existing seniority clause.

I suggest that arbitrators, relying on this doctrine, should take a purposive attitude towards the characterization of employment status under the agreement and reach results which will protect most of the legitimate interests served by the "implied obligation" approach. What we want to avoid is a power in the employer to utilize a subcontracting concept as a

"colourable" device to avoid the agreement where he does not make significant, functional and organizational changes in his method of doing business. The only reason for allowing management a unilateral prerogative is to give it the right to make "real" business innovations. If no real changes are made, then the subcontractor can be considered as a mere supplier of labour whose men become "employees" under the agreement. The reason is that they remain under the effective "control" of an unchanged, managerial arrangement. Only when the employer effectively severs a particular production, maintenance or other function from his own organizational control, and leaves its performance substantially within the unilateral discretion of the subcontractor, will he be able to avoid the agreement. The self-interest of various echelons in the management hierarchy should be sufficient to prevent illegitimate and unjustified use of subcontracting purely as a device to avoid the agreement (in much the same way as it operates in regard to plant relocation or business termination). 95/ I would add the comment that self-conscious adoption of such an approach would have led to the opposite result in Hume's Transport Ltd. and Coulter Mfg., two cases mentioned earlier.

In the same way, assignment of work outside the bargaining unit has been held to be a breach of the agreement where the effect of the assignment is to change the actual function of the non-unit employee to a sufficient extent that he is no longer outside the unit. The employer cannot unilaterally declare certain employees to be outside the unit 96/, or give their work to another unit 97/, or to a salaried employee. 98/ The arbitrator is required to look at all the facts and decide if the person now doing the unit work is, in substance, a foreman or a unit employee. 99/ Changes in the order of 15 to 20 per cent of the non-unit employees working time have been held not to achieve this qualitative change in his status.100/

In two recent cases 101/ involving an assignment of work within the unit allegedly in breach of occupational seniority rights, arbitrators have asked the same question: does the assignment have the effect of qualitatively changing the job performed by the assignee, whatever be his formal title, wage rates, etc? If it does, then the employer has no unilateral power to make the changed assignment. 102/

I have suggested that a purposive interpretation of the relevant provision in the agreement is necessary. An example of why this is so is a situation where the employer attempts to introduce a bonus incentive plan where the wage structure, and all the provisions related to it, is based on standard hourly rates. The agreement is completely ambiguous about whether such rates are to be merely minimum standards or are to be the sole basis of employee earnings during the term of the agreement. The arbitrator must decide whether it is more consistent with the framework established by the agreement for employee compensation that the employer can add to it, in whole or in part. In a recent decision, Fluid Power Co. 103/, I held that the distorting effect on the relative wage structure bargained for by the union rendered a unilateral introduction of a bonus incentive plan prohibited by this specific clause. Whether I was right or wrong on the substantive merits in that case, I feel that the approach adopted was correct. An arbitrator should look at the specific provisions in the agreement but establish their meaning in the light of their purposes rather than simply look to see if a so-called pre-existing management prerogative has been explicitly and literally altered. He should evaluate the actual effects of management's action in the light of this meaning and not stop at the formal characterization of the management step, as a sub-contract or work assignment, a bonus incentive plan, etc.

It is precisely this approach which was lacking in the cases dealing with compulsory retirement discussed earlier. We are given only ipse dixits to the effect that retirement is or is not qualitatively different from discharge and lay-off. There has been at best a very superficial analysis of the interests involved and the relevance of the purposes served by discharge for cause and seniority provisions. It is obvious that a lay-off is differentiated from a discharge by the fact that it is a temporary, rather than a permanent severance of the employment relationship and one that envisages its resumption some time in the future. Usually the reason for the lay-off is a shortage of work necessitating a reduction in the work force. It is obvious that compulsory retirement is not such a temporary severance of employment, caused by a reduction in the work force, and envisaging a resumption of employment. It is intended to be a permanent severance of employment and normally involves an immediate replacement (except in an "attrition" programme). As such it has the same consequences for the employee as a discharge.

However, it is sometimes asserted that retirement does not carry the connotations of moral opprobrium usually connected with a discharge (or a "firing"). Hence this is a sufficient reason for distinguishing this act from the protection provided for by the discharge clause. Yet it is not obvious that the chief concern which motivates employees in having limitations put on the discharge power is the loss of their self-esteem rather than the loss of their job. This conclusion is reinforced by a series of cases which have held that medical problems rendering an employee unfit for his job will justify a discharge. 104/ But the employer, in this case, has to prove this cause by establishing the facts of this employee's physical unfitness for the job. Why does the mere fact that the employer

selects a specific age, and applies it across the board, result in this qualitative change from discharge to retirement? In the absence of an explanation, and in situations where the employee has not been paid for his acquiescence by participation in a pension plan, these decisions seem dubious.

In any event, I would suggest that an arbitrator should go no further in limiting unilateral management initiative where no agreed-to standards are specified, than to require (1) no breach (via avoidance of the contract) of the statutory duty to respect union membership and rights; (2) observance of a duty of good faith disclosure in negotiations, and (3) no avoidance of the wage or other provisions of the agreement by the "colourable" adoption of the merely formal devices, such as a "subcontract". Intelligently applied, these standards can afford some significant protection of employee and union interests in situations where there is no doubt such protection is merited against the conduct in question.

SOCIETY'S PERSPECTIVE

Needless to say, such protection is a long way from an adequate answer to the legitimate problems posed by unions. The effects of management-initiated changes, even if motivated by valid business reasons, will still be adverse dislocation of existing conditions of employment, especially the availability of jobs to members of the bargaining unit. However, the response of the arbitrator in favour of such interests is not unambiguously in the "public interest". Moreover, the arbitrator, in making his response, cannot deceive himself that he is enforcing some type of tacit or implicit agreement (necessary to make the bargain "workable"). Rather he is operating as a political actor exercising delegated governmental and legal power

to implement value choices he is imposing on the parties. As such, if he wishes to play an activist role, he must be very careful, when he does intervene, to ensure that his decisions are legitimate manifestations of the "public good".

It is not within the compass of this paper to inquire in any detail whether or not it is desirable to impose restrictions on an employer seeking to maximize profits through the institution of organizational or technological change. However, since the writer engages in a substantial amount of arbitration, it might be appropriate to state briefly how the problem appears to him. This is some index of the ability of an arbitrator to persuade himself rationally that a particular ruling is correct. It is unlikely that the parties in any individual case could "educate" the arbitrator to any significant degree on the question and thus he would have to rely on his own "official notice". The following is what I might "officially note".

On the surface it appears obvious that the entrepreneurial function of instituting changes to minimize costs and increase productivity is of great value to society. 105/ Hence, it may be of dubious desirability for an arbitrator, acting as a "public official", to prohibit the exercise of this function merely because it affects too severely the interests of the immediate employees of the enterprise. There is no net gain to society when the arbitrator confers a property right in a job on the incumbent, the intended effect of which is to exclude the employees of a subcontractor or job seekers in an area in which the employer wishes to relocate. 106/ In fact, in the long run, the interests of the employees of the organized firm may be enhanced by greater profits achieved through management flexibility and their job security may remain constant since decisions to subcontract by

their employer may be matched by decisions of other firms to subcontract with him (at least in the make-or-buy situation if not in the subcontracting of plant services such as the cafeteria). Of course, changes in working conditions which involve the substitution of machines for men do involve an immediate lessening of employment in this function. However, it is commonly asserted that the interests of employees generally are served by innovations which increase productivity and thence the level of real wages. Moreover, the organizational interests of the union in its wage standards or in its membership, which it might seek to protect by prohibiting changes for the immediate benefit of unorganized employees, are themselves not unambiguously worthy of protection. Even if they are, it is doubtful that the blunt instrument of arbitral rulings is a desirable tool for achieving this.

Still, to the lay observer, these conclusions appear very dubious indeed. Social and economic conditions put in sharp relief the interest in job security of employees who are now working, especially since permanent unemployment is considered a normal part of the economic horizon. It may be that, in the long run, things will work out for the best but "in the long run, we are all dead". Even increased productivity and higher real wages are not necessarily valuable in the "affluent society" when weighed against a tendency to exclude more and more individuals from any more than minimal benefits of an ever increasing gross national product. The only effective way of relieving against these problems is through governmental policies that ensure there are enough jobs for those who want them and/or that those who cannot obtain a job are adequately protected from the consequences of unemployment. It is obvious that the institution of arbitration is not equal to this task.

There is a substantial body of expert opinion to the effect that the present growth in automation in industry and office differs only in degree from two centuries of technological change and that there is no evidence that our productive capacity will outgrow our consumer needs in the immediately foreseeable future. The more intensive effects of modern automation are confined to job security as opposed to employment security. The policy conclusions drawn from this diagnosis are that we should use fiscal policies that enhance the availability of job choices for everyone but discourage efforts to maintain security in any one job. The relevance of these conclusions to the development in arbitration of a legal regime creating a quasi-proprietary interest in a job is obvious. Some recent expert opinion suggests that this diagnosis may be correct as of now but that it is rapidly becoming outmoded and that fiscal policy (even accompanied by the type of "creative" collective bargaining I will describe below) will be highly ineffective in the face of these developing conditions. I query the capacity of labour arbitrators to make the choice between these two conflicting diagnoses. 107/

Even should broad governmental policies be largely successful in preventing long-term unemployment, there are substantial short-term dislocations which may result from employer initiatives (e.g., a period between jobs with no wages, loss of seniority, inability to use a hard-earned skill now made obsolete, effect on pension rights, etc.). Should the arbitrator attempt to minimize these costs by restricting employer initiative? There are at least two difficulties with this function. First, the arbitrator operates with a distorted view of the whole picture since he is provided only with the arguments of management and the "inside" union and may not see the implications of his decision for the third or "outside" parties

affected by it. Second, the arbitrator's decisions must run along a single dimension restricting (more or less) the employer's initiative to make changes. However, the problems are multi-dimensional. By this I mean that the most appropriate response may not be a prohibition (general or limited) of the work change itself but rather the provision of means of mitigating any adverse dislocation suffered by the employees. 108/

There are several techniques that have been developed in collective bargaining as means of adjustment to technological change. Three general approaches may be identified: the buy-out, gains-sharing, and manpower management. 109/ Devices used to compensate those workers whose interests suffer from individual change include severance pay, supplementary employment benefits and mobility allowances. In the alternative, savings in labour costs created by technological change may be passed on to those who are lucky enough to retain their employment. Each of these approaches tends to bring home to management the total cost of innovation by attributing to the latter the costs of the displaced employee. The third approach attempts to minimize the actual incidence of these costs rather than simply compensating for them. Such techniques as attrition, early retirement, job retraining, plant transfers, increased leisure time, etc., all increase employment opportunities and thus prevent undue loss of jobs as a result of industrial innovations.

Collective bargaining is the appropriate tool for dealing effectively with these facets of technological change. It enables all solutions to be tailored to the need of the individual parties as various possibilities are treated as bargaining items, their relative costs and benefits evaluated by each, and agreement eventually reached by the process of trading one for the

other. The difficulty is that the legal background in Canada precludes collective bargaining being an adequate substitute for arbitration as the institution with which society can deal with the problem of change during the term of the collective agreement. The fact of a compulsory no-strike clause, together with the absence of a continuing duty to bargain during the term of the agreement, minimizes the likelihood that the employer can be induced to engage in collective bargaining about these issues. This is true not only during the agreement, but also before.

It has been suggested that employers should be forced to bargain about changes in working conditions during the term of an agreement and various legal techniques have been suggested to facilitate this. 110/ I shall deal with these later on in the paper. At present, of course, no such legal regime exists. Certainly, as far as management is concerned, there is no real incentive to engage in meaningful bargaining about these decisions. I believe that the absence of such an incentive helps to make the solution of the problems of change during the term of an agreement an "unmanageable social task" 111/ for arbitration. In effect, the arbitrator is being asked to settle both the basic "armistice line" 112/ between management freedom and union participation in decision making and to fix the terms of settlement about specific points of conflict. It should be obvious, once it is recognized that these are precisely the decisions to be made, that arbitration is just not the proper institution for doing this job adequately. Yet the response might be made that at present the job is just not being done elsewhere, that although arbitration can at best reach imperfect solutions it can improve the situation somewhat, and that it cannot decide "not to decide". By the last I mean that the arbitrator cannot evade his responsibility by refusing to deal with the problem since by doing so he

does settle it, and he does so by holding in favour of management without adverting to the reasons for and against such a result. I believe this course of reasoning tacitly underlies much of the support gained for theories such as that of the "implied obligation". It can only be evaluated in the light of a general theory of the arbitrator's role, which I now propose to articulate.

REFERENCES

1/ Sec. 39 of The Labour Relations Act of Ontario; cf. Cobalt Foundry Ltd., (1958), C.C.H. L.L.R. 16, 169 (O.L.R.B.).

2/ See Arthurs, "Developing Industrial Citizenship", (1967) 45 Can. Bar Rev. 786 at 828-29.

3/ Horlacher, "Employee Job Rights versus Employer Job Control", from Collective Bargaining and the Arbitrator's Role (1962), 165-67.

Perhaps the best characterization is that of Horlacher:

> Perhaps the useful point of departure is to examine the implications of the correlative concepts of job rights and job control, as these terms will be used in this paper. Increasingly, it seems the incumbent of a job - encouraged and supported by his union - believes the incumbency confers on him a set of prerogatives. Not the least of these is a sense of title. This feeling is hardly perceptible when he first goes on the job, but as year follows year and his seniority cup gets fuller and fuller, he drinks deeply of this heady wine of possession and his consciousness of job entitlement grows even stronger.
>
> In time of layoffs his overriding job right is the right to remain in it while his juniors are being separated from their jobs. If, despite this protection, ill luck still overtakes him, forcing him out on the streets, he takes his protective right with him to enable him to return to the job to which he has title as against all possible usurpers.
>
> From this majority prerogative there is a major derivative. The basic right of seniority carries with it, in the eye of the job holder, the right to prevent any watering down of seniority. If the industrial community in which he holds his seniority claim is governed by a complex set of seniority rules operating within larger and smaller seniority jurisdictions, the job incumbent strongly asserts the right to halt all job structure changes that might dilute his seniority tenure.
>
> The incumbent believes that other ancillary rights flow from his seniority ownership. His title to the job is title to the work normally performed within the scope of the job category. And if he is a maintenance mechanic, he will have none of the company's taking maintenance work away from him and assigning it to a production worker - permanently by rearranging job content, or temporarily as when supervision fails to call him in on an overtime assignment giving the work instead to a production employee who already happens to be on the premises.

It is but an enlargement and collective application of this sense of job and work entitlement when the bargaining agent objects to the contracting out of work previously done by job owners within the bargaining unit, or objects to supervision performing nonsupervisory duties.

The incumbent's ancillary job seniority rights tend to expand beyond his own job and attach themselves to the plant job structure. When a more desirable job becomes vacant, he seeks to acquire the new job title on the same broad and unqualified basis he had retention rights to his own job - simply length of continuous service. All movements within the job structure - up, down or lateral - he would bring under the influence of the outward extension of his tenure rights in his own job. This extension becomes notable when wide ranging bumping rights in time of force reduction are acquired. And the extension has an interesting inverse consequence when it is applied successfully to force layoffs of junior employees who would otherwise have remained at work under a reduced work week schedule.

Without attempting an exhaustive catalogue of the ramifications of the job rights concept, it seems essential to notice one other major variety of its manifestations. Not only does the job incumbent move to defend his right of occupancy but he resists what he regards as encroachments on the value of his job possession. This he thinks can happen as a result of a change in job content which makes his job more hazardous or changes its economic value. The job holder's rights are thus conceived to encompass maintenance of the integrity of his job which he finds impaired if his personal risk is increased or his effort output stepped up without any commensurate increase in his job rate. Out of this cluster of job rights comes resistance to claimed speed ups, to changes in work rules or local working conditions, to manpower reductions growing out of new technology and production rationalizations, to creating, combining, and changing job classifications once the job structure has been reduced to written descriptions and the individual jobs evaluated and priced....

Seriously, I would like to suggest that the concept of employee job rights has two main configurations which in their detailed expressions are to some degree overlapping. One configuration is focused on job security; the other is focused on job integrity. These focuses represent completely legitimate interests of wage earners and the labor organizations that represent them. Who is to say they are values our industrial society should question or repudiate?

4/ Chamberlain, "Union Challenge to Management Control", (1963), 16 Industrial and Labour Relations Review 184, at 187.

5/ Such a realistic view is suggested by Galbraith, The New Industrial State, (1967).

6/ See Gomberg, "Featherbedding: An Assertion of Property Rights" from Annals (1961), 119.

7/ Cf. Moore, The Conduct of Corporations, (1962), 210.

8/ Phelps, "Management's Reserved Rights: An Industry View", from Management Rights and the Arbitration Process, (1956), 102.

A quite sophisticated statement reads as follows:

> Where we speak of the term "management's rights" in this context, we are referring to the residue of management's pre-existing functions which remains after the negotiation of a collective bargaining agreement. In the absence of such an agreement, management has absolute discretion in the hiring, firing, and the organization and direction of the working forces, subject only to such limitations as may be imposed by law....
>
> The more generally accepted view is that, except as management has agreed to restrict the exercise of its usual functions, it retains the same rights which it possessed before engaging in collective bargaining. I submit that this view is correct for it is the only one that gives full recognition to the realities of the collective bargaining relationship. In general, the process of collective bargaining involves an attempt by a labor union to persuade an employer to accept limitations upon the exercise of certain of his previously unrestricted managerial rights. To the extent that the union is unsuccessful in persuading an employer to agree to a particular demand, management's rights remain unlimited. It should equally follow that management possesses comparable freedom with respect to rights which the union has not even sought to limit....
>
> The job of management is to manage. The operation of the enterprise at its maximum efficiency is management's responsibility and obligation. If a management believes that, in order to discharge its obligations, it must retain in full measure the so-called prerogative of management, it has the right to refuse to agree in collective bargaining to restrict those rights. If the management should agree to limit its exclusive functions or even to delegate certain of its duties to a union, it can enter into an agreement that will clearly define how far it has agreed to go.
>
> However, this is an area that is peculiarly unsuitable for the development of any theoretical conception of a common law of contract interpretation. To read into the mere act of signing a contract implications that may never have been considered by either party is repugnant to the basic concept of the collective bargaining agreement that it is a voluntary act of the parties. That can be avoided only by interpreting the contract as the parties write it - an instrument containing

specific and limited restrictions on the functions that management would otherwise be free to exercise. To the extent that the parties have not seen fit to limit management's sphere of action, management's rights are unimpaired by the contract.

9/ Goldberg, "Management's Reserved Rights: A Labor View", from Management Rights and the Arbitration Process, (1956), 118

The collective bargaining idea exists in the knowledge that both labor and management are essential to operations and production and that they must come to terms before a settlement is reached. After they come to terms, we cannot now assume that somehow one party to the deal brings into it a backlog of rights and powers it enjoyed in dealing with individual employees.

A backlog of rights and practices and precedents does develop as the collective bargaining relationship continues, based not on pre-union history, but based on the period of the collective bargaining relationship.

The real question that arises is, what is the deal? Is it the contract or something more? I cannot agree that the deal includes the acceptance of the pre-union past as a guide for the future. But the practices which grow up during decades of a collective bargaining relationship cannot be swept aside. They have weight which must be measured in the specific case in the light of many factors. These practices, grievance settlements, understandings, etc., inevitably represent the set of circumstances which formed the back drop of the negotiation of the current agreement. Since every matter involving wages, hours, and working conditions is a matter to be determined by collective bargaining - and if this is not so then just what is collective bargaining? - then it is reasonable to assume that the contract is made in the light of the present circumstances. To the extent that present conditions and methods for change are not revised, they are accepted.

Therefore, each party has the right to assume that changes in wages, hours, or working conditions not provided for by contract can be made only by mutual agreement or by following practices for making changes which have existed during the collective bargaining relationship or by virtue of management's exercise of an exclusive right (such as introduction of new product, new machine, new material, new method of manufacture, etc.). To suggest that management can make changes at will unless the contract specifically bars it is unfair and can lead to placing so many bars in the contract as to make successful negotiating increasingly difficult and operations less and less flexible, with detailed consideration of the facts and merits of each case replaced by precise rules and regulations.

10/ The cases are exhaustively analyzed in Young, The Contracting out of Work, (1964).

11/ A representative arbitrator's statement is as follows:

> The company has the right to manage its business to the best of its ability in every respect, except to the extent that its rights are cut down by voluntary abrogation of some of these rights through contract with the union. The reservations (not restrictions) to management clause which appear in most contracts are nothing but a gratuitous acknowledgment by the union of this fundamental right. If the board is unable to find anything in the contract between the parties which takes away from the company's rights to conduct its own business, then it cannot be concerned with the quality of the action taken by the company nor whether it results in loss of jobs for employees of the company, nor whether the action which produced such results was exercised inside the four walls of the plant or elsewhere.
>
> (Electric Auto Lite, (1957), 7 L.A.C. 331.)

12/ Janitorial (Canadian Westinghouse, 4 L.A.C. 1536 (Lang)); parking lot attendant (Massey Ferguson Ltd., 13 L.A.C. 116 (Bennett)); cafeteria (Ford Motor Co., 8 L.A.C. 84 (Lang)); watchmen (Consumer's Gas Co., 12 L.A.C. 375 (Bennett)); floor cleaning (Smith & Stone Ltd., 14 L.A.C. 410 (MacKenzie)); landscaping (Dominion Rubber Co., 15 L.A.C. 115 (Sheppard)).

13/ Inventory (Peterboro Lock, 21 L.A.C. 1446 (Laskin)); installation (Guelph Yarns, 5 L.A.C. 1657 (Lang)); painting (Bradings Breweries (Ottawa) Ltd., 5 L.A.C. 2039 (Curtis)); waste disposal (General Motors Ltd., 8 L.A.C. 90 (Cross)); repairs (Algoma Steel Corp., 8 L.A.C. 273 (Laskin)); construction projects (Can. Gen. Elec., 9 L.A.C. 22 (Fuller)).

14/ Transport driving (Hume's Transport Ltd., 14 L.A.C. 152 (Reville)); parts manufacturing (Coulter Mfg. Co. Ltd., 15 L.A.C. 325 (Little)); type-setting (Ottawa Journal, 15 L.A.C. 380 (Hanrahan)); and supplying an oil burner cleaning service (Elias Rogers Co. Ltd., 14 L.A.C. 87 (Bennett)).

15/ As in Smith & Stone Ltd., 14 L.A.C. 410 (Mackenzie).

16/ Allied Chemical Ltd., 16 L.A.C. 48 (Reville).

17/ Champion Spark Plug Co. Ltd., 10 L.A.C. 67 (Cowan).

18/ Guelph Yarns, 5 L.A.C. 1657 (Lang).

19/ Ford Motor Co., 8 L.A.C. 84 (Lang).

20/ Brading Breweries (Ottawa) Ltd., 5 L.A.C. 2039 (Curtis).

21/ B.O.A.C., 10 L.A.C. 208 (Lande); Coulter Mfg. Co. Ltd., 15 L.A.C. 325 (Little). As was said in Moore Business Forms, quoted in Young supra at 95:

> Extreme though this hypothesis may be, there is, apparently, nothing to prevent a company from eventually contracting away all measure of direct control over its production save the terms of a collective bargaining agreement, so drafted as to prevent this being done. However, it would seem logical to conclude that any company whose cost of production was so high in every department that other firms could do the job more cheaply would have found itself out of business long before this stage had been reached.

22/ Fibreglass Ltd., 6 L.A.C. 322 (Laskin).

23/ As in C.G.E., 5 L.A.C. 1832 (Fuller).

24/ C.G.E., 10 L.A.C. (Cross).

25/ Fibreglass Ltd., 6 L.A.C. 322 (Laskin).

26/ Can. Westinghouse, 12 L.A.C. 133 (Reville); upheld by Ontario Court of Appeal in (1962) O.R. 17; 30 D.L.R. 2d 673.

27/ American Standard Products, 12 L.A.C. 29 (Fuller); Dominion Bridge Co. Ltd., 13 L.A.C. 329 (Bennett).

28/ Consolidated Sand & Gravel Ltd., 16 L.A.C. 174 (Hanrahan).

29/ Falconbridge Nickel Mines Ltd., 10 L.A.C. 189 (Little).

30/ See the discussion in Steel Co. of Canada, Frost Works, 17 L.A.C. 90 at 97 (Bennett), and the cases referred to there.

31/ General Motors Diesel Ltd., 5 L.A.C. 1632 (Cross); Canada Bread Co. Ltd., 16 L.A.C. 202 (Reville).

32/ Richard L. Hearn Generating Station Unit, H.E.P.C. of Ontario, 15 L.A.C. 120 (Thomas); Fibreglass Ltd., 6 L.A.C. 322 (Laskin).

33/ DeHavilland Aircraft of Canada Ltd., 15 L.A.C. 120 (Cross).

34/ 15 L.A.C. 236 (Reville).

35/ Fittings Ltd., 10 L.A.C. 294 (Little).

36/ American Standard Products, 11 L.A.C. 283 (Bennett).

37/ National Hosiery Mills, 5 L.A.C. 1978 (Fuller); Light Alloys 6 L.A.C. 83 (Taylor).

38/ Ford Motor Co., 5 L.A.C. 1609 (Cross).

39/ Ferranti-Packard Electric, 14 L.A.C. 52 (Bennett).

40/ Canada Bread Co. Ltd., 12 L.A.C. 203 (Reville).

41/ Perfect Circle, (1968), unreported, (Arthurs).

42/ Rexall Drug Co. Ltd., 4 L.A.C. 1468 (Laskin); B.C. Forest Products Ltd., 8 L.A.C. 153 (Carrothers).

43/ Canadian Car & Foundry, 6 L.A.C. 161 (Curtis).

44/ Port Hope Sanitary Mfg. Co. Ltd., 3 L.A.C. 1144 (Cochrane); Canadian Westinghouse Co. Ltd., 4 L.A.C. 1210 (Anderson); Libby, McNeil & Libby, 5 L.A.C. 2120 (Roach).

45/ 10 L.A.C. 121, (Hanrahan).

46/ In Dominion Tar & Chemical, 10 L.A.C. 331 (Hanrahan).

47/ (1960), 21 D.L.R. (2d)273 at 276-79.

48/ (1961), 26 D.L.R. (2d)704 at 705-06.

49/ 12 L.A.C. 25 (Wilson).

50/ Dunham-Bush (Canada) Ltd., 15 L.A.C. 220 (Lang).

51/ Exelon Co. of Canada, 18 L.A.C. 26 (Weatherill).

52/ Bennett-Pratt Ltd., 17 L.A.C. 211 (Little).

53/ General Steelwares, 17 L.A.C. 304 (Lande).

54/ Mannesman Tube Co., 16 L.A.C. 347 (Arthurs).

55/ Pigott Construction Co., 16 L.A.C. 33 (Hanrahan).

56/ Canadian Westinghouse, 17 L.A.C. 123 (Hanrahan).

57/ Perhaps the apotheosis of this whole approach was reached in Construction Aggregates Corp. as the following excerpt suggests:

> My own opinion is that the situation which has given rise to this grievance was not contemplated by the parties when the provisions dealing with lay-off and the application of seniority were drafted. A careful reading of all the relevant provisions of the agreement dealing with seniority and lay-off would not suggest that either party to the agreement had in mind the application of such provisions to the case of a work stoppage for a period of one shift only. If this is so then this board would be stepping outside of its proper

jurisdiction if it were to attempt to write into the agreement a provision which neither of the parties intended to be included in the agreement.

In other words this board is required to interpret the terms of this collective agreement but if it appears from an examination of the agreement that there is an hiatus or complete gap in the agreement which has failed to cover the situation then it is no proper function of a board of arbitration to remedy that gap by writing into the agreement terms which the parties have not negotiated themselves.

For example, some agreements provide in effect that short term reductions or loss of work will not be considered lay-offs if not exceeding a period of five or seven or ten days, etc. Obviously the length of time specified is a matter of negotiation and agreement between the parties to the contract.

It would be hardly reasonable and, indeed, quite unrealistic for this board to say that a stoppage of less than eight hours is not a lay-off but a stoppage of eight hours or more is to be considered to be a lay-off when the agreement itself is silent and the determination of such a matter is really a matter for negotiation between the parties based upon the circumstances of the particular operation being carried out by the company.

Thus as a general rule boards of arbitration habitually refrain from writing agreements for the parties and where the contract itself fails to give any reliable guide to the intentions of the parties the board of arbitration generally refers the matter back to the parties to be dealt with at the bargaining table. Article 7.11 of the agreement appears to contemplate this as it provides that "no arbitrator shall have the power to add (to)...the terms of this agreement."

Accordingly it is my view that this board has no jurisdiction to remedy what is an obvious defect in the agreement by the failure to define a short term reduction in working force and consequently this grievance cannot succeed.

In the result the grievance is dismissed and I do so award.

(1959) 9 L.A.C. 187 at 176-77).

58/ He originally suggested this approach in Peterboro Lock, (1953), 4 L.A.C. 1499, a case dealing with a problem of job classification. There he said:

In this board's view, it is a very superficial generalization to contend that a collective agreement must be read as limiting an employer's pre-collective bargaining prerogatives only to the extent expressly stipulated. Such a

> generalization ignores completely the climate of employer-employee relations under a collective agreement. The change from individual to collective bargaining is a change in kind and not merely a difference in degree. The introduction of a collective bargaining regime involves the acceptance by the parties of assumptions which are entirely alien to an era of individual bargaining. Hence, any attempt to measure rights and duties in employer-employee relations by reference to pre-collective bargaining standards is an attempt to re-enter a world which ceased to exist. Just as the period of individual bargaining had its own common law worked out empirically over many years, so does a collective bargaining regime have a common law to be invoked to give consistency and meaning to the collective agreement on which it is based.

He reiterated his belief in the validity of this approach in Falconbridge Nickel Mines (1958), 8 L.A.C. 276, at 282. To those who criticized his concept of the climate of employer-employee relations under the collective agreement, he replied, at 283:

> It may be suggested that this phrase is a more accurate reference to the basic statutory policy on which the Peterboro Lock award proceeded than was the phrase "law of the collective agreement" which the minority member used in the Peterboro Lock case. The law is to be found outside the collective agreement in principles and doctrines which must take their inspiration from the aims and purposes of collective bargaining as reflected in the elements of the policy, statutory or otherwise, of which the collective agreement is an expression. It was in this sense that the Peterboro Lock award spoke of the climate of employer-employee relations...and spoke also of the gradual evaluation of a common law to give meaning and consistency to a collective agreement....

59/ See Falconbridge Nickel Mines at 282.

60/ In Studebaker-Packard (1957), 7 L.A.C. 310; cf. also Can. Car Co., 8 L.A.C. 333 (Cooper).

61/ Hawker-Siddeley Canada Ltd., 14 L.A.C. 197 (Laskin).

62/ 8 L.A.C. 273 (Laskin).

63/ Looked at as an original question, there may have been much to recommend the "Laskin" position; indeed it is a position which is widely accepted in labour arbitration in the United States. But to whatever extent the collective bargaining climate may pervade contract interpretation in other areas, in the matter of contracting out, it can no longer be said to do so. Our reason for so holding is in fact rooted in the "Laskin" approach, for Professor Laskin himself refers to the "climate" of employer-employee relations under a collective agreement. In our view, this "climate" is of decided relevance,

but it is not a climate solely generated by or confined to the relationships between the particular company and the particular group of employees. As well, the "climate" reflects and in turn contributes to a broader climate prevailing throughout a particular industry, often extending generally to all collective bargaining relationships, and sometimes even borrowing general legal and social concepts from beyond the world of industrial relations....

In pursuing our task of industrial meteorology, then, we cannot ignore the fact that part of the "climate" within which labour and management operate in Ontario is the controversy over contracting out. See in this regard, Young, The Contracting Out of Work (Queen's University Industrial Relations Centre: 1964). The wide notoriety given to labour's protests against this practice, the almost equally wide notoriety, especially amongst experienced labour and management representatives, of the overwhelming trend of decisions, must mean that there was known to those parties at the time they negotiated the collective agreement the strong probability that an arbitrator would not find any implicit limitation on management's right to contract out. It was one thing to imply such a limitation in the early years of this controversy when one could not speak with any clear certainty about the expectations of the parties; then, one might impose upon them the objective implications of the language of the agreement. It is quite another thing to attribute intentions and undertakings to them today, when they are aware, as a practical matter, of the need to specifically prohibit contracting out if they are to persuade an arbitrator of their intention to do so.

(Professor H.W. Arthurs, at (1967), 17 L.A.C. 253)

64/ A domestic tribunal of this character created by the terms of a collective agreement fortified by statutory sanction is not an autocrat free to act as it pleases, but is bound by the jurisprudence of the country which must continue to govern the multifarious relations between subject and subject arising and developing in our social order with ever increasing complexity. The recognized canons of construction applying to deeds, contracts or other instruments cannot be disregarded, and if by deliberate or mistaken construction of a contract an inferior tribunal arrogates to itself a jurisdiction which, on a proper construction of the constituent instrument it is not free to exercise, there is an excess of jurisdiction which justifies a Court of review in quashing the resultant award on a motion by way of certiorari. As I see it, the words of art 3.01 read in conjunction with arts. 3.02 and 8.17 are to be interpreted in their ordinary, natural and grammatical sense. When so read there is nothing in the context or in the Labour Relations Act, more particularly s. 34(1) thereof, or in the underlying purpose and object of the agreement which would justify a departure from this fundamental rule and so authorize a Court construing

the document to ascribe a special sense to the language in which the agreement is clothed.

(Mr. Justice Schroeder, dissenting, R. v. Arthurs, Ex p. Port Arthur Shipbuilding (1967), 2 O.R. 45 at 53.)

65/ There is some apparent acceptance of the reserved rights theory, yet several scholars have unequivocally stated that the absolute reserved rights theory has, at present, no acceptance whatsoever. They allege that any such remarks as the above are invariably qualified by statements about good faith and business efficiency, which requirements are then found to be established by the facts.

There are several comprehensive analyses of the cases, ending at different points of time. They include:

(1) Dash, Celanese Corp. of America (1959), 33 Lab. Arb. 925.

(2) Crawford, "The Arbitration of Disputes over Subcontracting", in Challenges to Arbitration 55 (1961).

(3) Dash, "The Arbitration of Subcontracting Disputes", (1962), 16 Ind. & Lab. Rel. Rev. 208.

(4) Greenbaum, "The Arbitration of Subcontracting Disputes: An Addendum" (1963), 16 Ind. & Lab. Rel. Rev. 221.

(5) Smith, "Subcontracting and Union Management Legal and Contractual Relations" (1966), 17 Western Reserve Law Rev. 1272.

The union position has also met with some acceptance. Some important academic commentators have approved the theory of the implied continuance of the status quo, requiring mutual consent for its change.

Cf. Cox & Dunlop, "The Duty to Bargain Collectively During the Term of an Existing Collective Agreement" (1950), 63 Harvard Law Review 1097 at 1166 ff; Brown, "Management Rights and the Collective Agreement" in Proceedings First Ann. Meeting of Industrial Relations Research Association 145 (1948); Wollett, "The Duty to Bargain over the "Unwritten" Terms and Conditions of Employment" (1958), 36 Texas L. Rev. 863 at 877.

Moreover, there are several decisions which hold that the recognition clause, the seniority clause, the union security clause, the discharge clause, or even the agreed-to wage structure, are all "instinct with an obligation, imperfectly expressed", which is necessary to make them workable. This limitation, implied from the express clauses, requires that the employer be precluded from encroaching on the bargaining unit, since to grant him this power necessarily involves the capacity to avoid the bargaining he has made by eliminating the unit which is its basis. Interestingly enough the chief support for this theory is a judicial decision, that of the Second Circuit, in Webster Electric Co.

However, various statistical surveys have shown that any acceptance either of these extreme positions might have enjoyed has been almost completely eroded by now.

66/ One of the most important United States arbitrators summarizes the rationale for this policy-making role as follows:

> The long and short of the matter is that the very essence of a collective agreement implies some limitation on the power to contract out work and that with the signing of a labour agreement, the right previously held is no longer absolute. At the same time where the agreement is silent on the subject, such implied limitation as is inherent in the writing is a country mile from an outright prohibition. This represents the general thinking among arbitrators....
>
> The innate logic of the implied-obligations view of the collective agreement is that it reconciles this conflict by recognizing that society needs the benefits of management's productive radicalism but that it must not be employed to mask an attack on the security of the work force as a whole.
>
> It is axiomatic that a contracting party is not privileged to engage in a course of conduct designed to nullify its agreement. My friend in the tire manufacturing business was under no illusion that having recognized the Rubber Workers Union as the bargaining agent for his production workers, he could avoid the consequences of that act by having a labour contractor come in to do the same work at the same machines, even if they were paid the same, much less lower, wages. A labour contract may not guarantee job security or hold out a promise that all the work to be done for the employer will be done by people under its coverage. But it would be worthy of scant respect if it were construed to be a promise to recognize the union and to apply its standards only if the employer, in his sole discretion, decides to have the work done by union members and not by others. This would be akin to saying that the employer's undertaking to meet the contract's terms involves no real commitment whereas the union's undertaking to abide by its terms is enforceable.
>
> But to say that a silent contract may imply some limitations on subcontracting is not to say that it bars it. On the contrary, the contract's silence shows that there was no outright cession of the authority. By signing an agreement which says nothing about subcontracting, the employer can be adjudged to have done no more than agree not to use the right in an unreasonable way to reduce the scope of the unit or thwart the agreement's stated terms. But short of that, the right to contract out work can continue to be exercised.

> The argument that the recognition, seniority, union shop, or other clauses in the agreement automatically bars the contracting out of work fails, because it collides head on with the realities of our business system. The employer was free to add to or delete jobs from his work force as his concepts of technology or of priorities in the organization of work changed. When he assumed the obligation of union recognition for the purpose of collective bargaining, he assuredly did not assent to a total surrender of that flexibility or to the assumption of a set of rigid restrictions on his right to innovate.
>
> But with the inception of collective bargaining, he perforce acquired a relationship with a new institution. That institution inevitably became a factor in his business calculations, because by entering into a contract with it, he assumed an obligation to respect its integrity and to refrain from so exercising his powers as to significantly impair its ability to function. That sort of mutuality is the essence of contract. Hence, latent in the collective agreement is an obligation not to act so as to thwart the realization by the other party of its benefits.
>
> (Wallen, "How Issues of Subcontracting and Plant Removal are Handled by Arbitrators" (1966), 19 Ind. & Lab. Rel. Rev. 265).

67/ Two good student notes have isolated these and other factors:
Note: "Arbitration of Subcontracting Disputes: Management Direction v. Job Security", (1962), 37 N.Y.U. L. Rev. 523.
Note: "A Standard for Arbitrators in Subcontracting Disputes", (1963-64), 39 Indiana Law J. 561.

68/ This argument is elaborated in Young, "The Question of Managerial Prerogatives" (1963), 16 Ind. & Lab. Rel. Rev. 240.

69/ Cf. sec. 33 of The Labour Relations Act of Ontario.

70/ An effective rebuttal of the arguments based on such clauses is contained in Fairweather, "Implied Restrictions on Work Movements" (1963), 38 Notre Dame Lawyer 518.

71/ Cf. quotations from Russelsteel, at ref. 63 above.

72/ The analogy is suggested by Horlacher, in the article cited supra, at ref. 3, at 194-96.

73/ Cox, "Reflections Upon Labour Arbitration", (1959), 72 Harv. L. Rev. 1482 at 1505.

74/ Assuming, as is the case in the United States, that the duty to bargain continues during the term of the agreement.

75/ Such an argument would build on cases such as International Brotherhood of Teamsters v. Therien (1960), S.C.R. 265 and Rookes v. Barnard (1964), 1 All E.R. 367.

76/ The report is more properly entitled, Report of The Industrial Inquiry Commission on Canadian National Railways "Run-Throughs", (1965). The relevant discussion is at page 92.

77/ A good example, confirmed by the courts, is the implication of a condition that failure by employees to work, due to a refusal to cross a picket line which was explicitly privileged under the agreement, would absolve an employer from his responsibility to pay hospitalization and pension benefits. See Regina v. Fuller; ex parte Earles (1967) 67 CLLC 14, 004.

78/ Cox, "Reflections on Labour Arbitration", cited in ref. 73, 1497.

79/ A classic statement of this rationale was made by a dissenting member of the NLRB in the case of Jacobs Mfg. Co. (1951), 94 NLRB 1214 at 1231ff:

> It is well established that the function of collective bargaining agreements is to contribute stability, so essential to sound industrial relations. Contractually stabilized industrial relations enable employers, because of fixed labor costs, to engage in sound long-range production planning, and employees, because of fixed wage, seniority, promotion, and grievance provisions, to anticipate secure employment tenure. Hence, when an employer and a labor organization have through the processes of collective bargaining negotiated an agreement containing the terms and conditions of employment for a definite period of time, their total rights and obligations emanating from the employer-employee relationship should remain fixed for that time. Stabilized therefore are the rights and obligations of the parties with respect to all bargainable subjects whether the subjects are or are not specifically set forth in the contract. To hold otherwise and prescribe bargaining on unmentioned subjects would result in continued alteration of the total rights and obligations under the contract, thus rendering meaningless the concept of contract stability.
>
> That a collective bargaining agreement stabilizes all rights and conditions of employment is consonant with the generally accepted concept of the nature of such an agreement. The basic terms and conditions of employment existing at the time the collective bargaining agreement is executed, and which are not specifically altered by, or mentioned in, the agreement are part of the status quo which the parties, by implication, consider as being adopted as an essential element of the agreement. This view is termed "reasonable and logical", and its widespread endorsement as sound industrial relations practice makes it a general rule followed in the arbitration of disputes arising during the term of a contract.

> The reasonableness of the approach is apparent upon an understanding of collective bargaining techniques. Many items are not mentioned in a collective bargaining agreement either because of concessions at the bargaining table or because one of the parties may have considered it propitious to forego raising one subject in the hope of securing a more advantageous deal on another. Subjects traded off or foregone should under these circumstances, be as irrevocably settled as those specifically covered and settled by the agreement. To require bargaining on such subjects during midterm debases initial contract negotiations.

This position has been supported by many academic commentators, such as Cox and Dunlop, Brown and Wollett. The references are set out in full in ref. 65. As we shall see this is, in effect, the same position as that advocated in Mr. Justice Freedman's report.

80/ An apt statement of this view is that already quoted from Construction Aggregates Co., in ref. 57.

81/ Canadian General Electric, 2 L.A.C. 688 (Laskin); Carling Breweries Ltd., 10 L.A.C. 25 (Cross).

82/ K.V.P. Co. Ltd., 16 L.A.C. 73 (Robinson).

83/ Canadian Westinghouse, 15 L.A.C. 348 (Bennett).

84/ Chrysler Corp. of Canada, 11 L.A.C. 152 (Bennett).

85/ Union Gas Co. of Canada, 12 L.A.C. 58 (Reville); Union Carbide (Canada) Ltd., 13 L.A.C. 79 (Reville).

86/ Union Carbide (Canada) Ltd., 15 L.A.C. 305 (Lane); Union Carbide (Canada) Ltd., 17 L.A.C. 171 (Christie).

87/ Carling Breweries Ltd., (1968), unreported (Christie)

88/ Dominion Forge Co., (1968), unreported (O'Shea).

89/ Cf. quotation from Wallen, at ref. 66 above.

90/ Norton Co. of Canada Ltd., 4 L.A.C. 1451 (Fuller).

91/ Philco Corp. of Canada, 13 L.A.C. 291 (Hanrahan).

92/ Hume's Transport Ltd., 14 L.A.C. 152 (Reville).

93/ As in Stanley Works of Canada, 15 L.A.C. 218, (Fuller); Rothman's of Pall Mall Canada, 14 L.A.C. 232 (Little); C.B.C., 17 L.A.C. 218 (Anderson).

94/ As in C.G.E., 9 L.A.C. 21 (Fuller); Hume's Transport Ltd. cited above.

95/ The divergence of interest in management about subcontracting, and its relevance to this issue, is aptly described in Chandler, Management Rights and Union Interests, 1964. Cf. also Moore, The Conduct of the Corporation (1962), esp. ch. 13.

96/ Empire Brass Mfg. (1967), unreported (Fuller).

97/ DeHavilland Aircraft, 10 L.A.C. 90 (Cross).

98/ Standard Sanitary and Dominion Radiator Ltd., 5 L.A.C. 1684 (Roach).

99/ John Bertram & Sons, 5 L.A.C. 2117 (Yonge).

100/ Ferranti-Packard Electric; American Standard Products, cited above.

101/ Foreshadowed by dicta in General Motors of Canada, 4 L.A.C. 1506 (Finkleman).

102/ So held in Loblaw Groceterias Co. Ltd. (1967), unreported, (Weatherill); not sufficiently proved in Algoma Steel Co. (1968), unreported (Weiler).

103/ 19 L.A.C. 51.

104/ Recent examples of such cases where discharge has been upheld for physical incapacity are Union Carbide, 12 L.A.C. 159 (Cross); Page Hersey Tubes, 13 L.A.C. 21 (Reville); Muller Ltd., 17 L.A.C. 322 (Fox); International Nickel, 16 L.A.C. 277 (Hanrahan).

105/ Weber, "Plant Removals and Subcontracting of Work: Social and Economic Considerations", (1964) 14 Labour Law J. 373.

106/ In a recent case of my own, I was presented with a set of facts demonstrating this proposition quite starkly. The company had habitually rotated weekly stand-by duty among a group of six employees who earned over $1,000 a year each from it. Five employees were in the bargaining unit which did the work regularly during the day. The sixth had moved from that unit to a better job, covered by another agreement with the same local, but still continued to get the stand-by duty. The union grieved, asking that all the work be given to the five regular employees. What net social gain would be obtained from a decision based on an implied obligation "protecting the integrity of the work given to the bargaining unit"?

107/ Compare Seligman, Most Notorious Victory (1967) with Report of U.S. National Commission on Technology, Automation and Economic Progress (1966).

108/ Compare Ch. 11 Chambers, cited supra in ref. 95 with Weber, cited supra, at ref. 105.

109/ Weber, "Collective Bargaining and the Challenge of Technological Change", in Industrial Relations: Challenges and Responses (ed. Crispo, (1966), 83 and 85; cf. also Report of National Conference on Labour-Management Relations (1967), 27-33.

110/ Especially by the Freedman report, cited earlier at ref. 76.

111/ A term suggested in Polanyi, The Logic of Liberty (1951), 154-200. By this is meant that it is an "end which seems in the abstract desirable but for the attainment of which no social form can be devised that does not involve an obviously disproportionate cost"; Fuller, "American Legal Philosophy at Mid-Century", (1954), 6 J. Legal Ed. 457 at 477-78.

112/ Cf. the quotation from Cox, "Reflections on Labour Arbitration" at ref. 73.

CHAPTER II

A THEORY OF THE SCOPE AND LIMITATIONS OF THE ARBITRATOR'S ROLE

INTRODUCTION

Two themes run through most discussions of the nature of the arbitrator's role. On the one hand, he is expected to act as a lawyer-judge, bringing "legalist" tools to bear on the interpretation of the collective agreement, his only charter for action. On the other hand, he is alleged to have certain distinctive qualities, of expertise and experience, which legitimize actions that are based on peculiar "non-legal" criteria, in particular the maintenance of a peaceful, uninterrupted, and fair industrial enterprise. 1/

The first theory of the arbitrator as judge 2/ contains within itself an essential ambiguity concerning the appropriate mode of judicial action. Some arbitrators feel that they must confine themselves to decisions that are based only on an explicit and specific provision in the collective agreement. In attributing a meaning to such a provision they restrict their assessment of the parties' will to the bare surface of the arrangement, the "literal" or dictionary meaning of the words. Other arbitrators may feel that it is even more appropriate to delve beneath the surface of the text of a contract clause and assign a meaning which is most compatible with the purpose of the parties in selecting this text. When such a mutually agreed-to purpose is divined, these arbitrators may also feel it appropriate to develop and elaborate the principles it implies and then apply these principles to the instant case before them.

The second theory of the arbitrator's role, the arbitrator as "labour relations physician" 3/, holds that it is sometimes legitimate for an arbitrator to extend or limit what can fairly be said to be the meaning of an agreement (whether derived purposively or literally) in the light of certain overriding labour relations goals. This theory also contains within itself an essential ambiguity. Some advocate the arbitrator acting as a "mediator", attempting to get specific, individualized, consensual accords between the parties and thus enhancing the process of free, collective bargaining even during the administration of the agreement. Others argue that arbitrators must become aware of their necessary position as an "industrial policy-maker" and attempt intelligently to lay down authoritative, general policies in the interests of the public as well as the immediate parties.

Each of these different theories, when worked out in detail in the literature, is sufficiently complex and sophisticated that it takes account of, and tends to shade into, each of the others. However, I am going to formulate abstract models in order to illustrate the institutional logic of each of the distinctive value judgments which lie at the roots of the different theories. I do not contend that any of the theorists cited would embrace, in an unqualified form, the models I will develop. The latter are intended to isolate the key facets of the arbitration process which are perceived by the different theories and show how these are used as the basis for different proposals and conclusions about the nature and scope of arbitral decision making. Each assumes that there is an intrinsic, reciprocal relationship between the job we ask arbitration to perform, the design of the arbitration within which arbitrators operate, and the manner in which we expect them to reach their decisions.

THE ARBITRATOR AS MEDIATOR

One of these models we can entitle "the arbitrator as mediator". 4/ This model conceives of arbitration as being at the end of a continuous spectrum which extends backward through the mutual adjustment of grievances to the original negotiation of the terms of a collective agreement. The paradigm case for their model involved a complex industrial establishment with many divergent, conflicting centres of interest, and requiring continual, intelligent adjustment of problems in the light of previously settled policies. Collective bargaining is the logical application of a free market economy to the problem of the terms and conditions of employment when the latter is informed by a concern for industrial democracy. In other words, it allows the employees to wield sufficient power to participate in the determination of their conditions of employment, and makes the touchstone for the latter their mutual acceptability to the various interests inherent in the enterprise and not their conformity to some governmental policy about the "public interest". Hence arbitration must first be perceived as an essential part of industrial (or economic) self-government.

The next important facet of the model is the recognition that collective bargaining is sharply distinguished from other forms of contract negotiation (and administration), because the parties at interest are inextricably wedded together in a permanent relationship. Hence the signing of a collective agreement can no more be looked upon as a final resolution of their mutual conflicts and problems than can the "wedding ceremony" in domestic relations. No doubt the collective agreement is a necessary source of stability and security in the relationship. It secures the

commitment of the other party to long term policies and principles on the basis of which each is free to pursue its own purposes. However, any attempt to subject the ongoing enterprise to detailed prescriptions is not only impossible (because of the human incapacity to anticipate all problems for as far in the future as the normal collective agreement extends) but also undesirable (first, because of the unlikelihood of intelligent solution to these problems in the abstract and, second, because the necessity of arriving at final agreement requires statement in general and rather ambiguous principle as opposed to specific detail). Hence, as Shulman states:

> The collective agreement thus incorporates a variety of attributes. In part it is a detailed statement of rules, particularized and clear; in part it is a constitution for future governance requiring all the capacity for adaptation to future needs that a constitution for government implies; in part it is a statement of good intentions and trust in the parties' ability to solve their future joint problems; in part it is a political platform, an exhortation, a code of ethics. 5/

Into this situation is inserted the arbitrator who is expected to settle those disputes, and solve those problems, left unresolved by mutual grievance adjustment. The arbitrator can act as an adjudicator, serving as a more efficient, expeditious, and inexpensive avenue for this type of decision than the regular judicial system. However, the legalistic, adjudicative resolution of the dispute is unsuited for parties who must live together with each other following the decision, who will be affected in later negotiating situations by positions taken early in an adversary posture and who will have to take the consequences of "victories" which are not wisely addressed to the substantive problems.

Hence this model envisages the arbitrator as, ideally, performing the function of mediation. He can utilize private sources of information to

get at the "real" facts that define the labour relations substance of the grievance (rather than the "artificial" case which filters through in the adversary context where the "cards are not on the table") and thus ensure that his decision does not impinge in a harmful way on the industrial relationship within which it becomes a precedent. The basic criterion for all decisions should be their "mutual acceptability", including especially the willing acquiescence by any "losing party". Of course, the best evidence of such acceptability will be the actual agreement by the parties to the decision. The arbitrator should utilize all available resources to achieve this agreement or at least to tailor the eventual decision in a way which preserves the essential interests of the losing party.

The rationale for the achievement of mediated agreements by the arbitrator, which could have been reached by the parties alone, was the desire to avoid a legalistic, premature decision by the arbitrator in favour of one side which would freeze the situation and prevent a desirable consensus. Moreover, because the strike or lockout are obviously wasteful (and hence not too credible) procedures for inducing agreement to adjust the ordinary "run of the mill" grievance, the arbitrator-mediator should feel free to use the "sanction" of a judicial decision to induce the agreement (or compromise) for which he is seeking. Finally, because of the previously-noted fact of the internal conflict among the different constituencies within each of union and management, certain agreements which are substantively desirable perhaps could not be ratified. The mediator again is able to use his arbitrator's role to further the process of collective bargaining and mutual adjustment by putting in the form of an "award" the previously consented-to decision (and going through the charade of a hearing if need be). In fact, in Canada the self-conscious adoption of the mediation model is

rare. 6/ I understand, though, that it is the practice in the garment industry, that this fulfills the mutual expectations of the parties, and that any radical change would produce chaos. Nevertheless, this is a rare exception. However, it is possible to conceive of an institutional format which is quite appropriate for the function of mediation proposed for the arbitrator. 7/

Several conditions would have to be satisfied. In the first place, the person of the arbitrator would be vital. He would have to be of great ability, knowledge and tact and, it would seem, he would have to be in some type of permanent role. (By this I mean that he would not be an ad hoc appointee but rather must have had long experience with the parties. I do not mean that he have some type of permanent tenure. Indeed, it is vital to the model that his appointment be at the pleasure of either party.)

One consequence is that arbitrators (of grievances) in this industrial situation cannot be interchangeable. The personality of a permanent umpire, his knowledge of the uncommunicated expectations of the parties and their awareness of his attitudes, are vital to the success of the process, and these can be obtained only over a period of time. It must be remembered that we are not dealing here with mediation of an interest-dispute where there is no contract to fall back on (only economic warfare). Rather, there is some structure of legal relations that confers rights a party may feel he has bargained (and paid) for. One important role of the arbitrator is to preclude unwise reliance on these "rights" in the long-run interests of the joint enterprise. It is unlikely that an ad hoc arbitrator would be equal to such a task.

Second, it is likely that such a function can best be performed where the "legal" environment is minimally structured. By contrast, where the collective agreement is relatively exhaustive and its language seems to speak with some precision to the immediate problem, the fact that a pre-existing legal right has been negotiated for is likely to be very apparent and the fairness of requiring the beneficiary to give it up now (unilaterally) will not be so apparent. Again, the arbitrator may give reasoned opinions justifying his early decisions in the light of the agreement, which opinions spell out the appropriate general rules governing the type-situation. If these opinions are collected and relied on in the ongoing enterprise (and in the renegotiation of the agreement), then the forces in favour of adherence to precedent will be pressing (especially for retroactive decisions). Hence, we should expect mediation to function best where the collective agreements are very brief and dispose only of major problems (such as the wage structure), and where arbitration of day-to-day grievances has not created a body of precedent. (Thus mediation will be far more appropriate in the early life of a collective bargaining relationship.)

Thirdly, and perhaps most important, mediation of contract grievances will be most appropriate in an enterprise with relatively undifferentiated authority (on both the management and the union side). If the persons who present the grievances to the arbitrator are the same as those who actually make the decisions about the terms to be negotiated in the agreement, then arbitration will involve intelligent participation by those whose interests are vitally affected by the decision. In this social context, the prima facie unfairness of such devices as the "compromise award", the "fixed award", and "enforced mediation" may well be dispelled. The process of

continuous negotiation of the collective bargaining relationship affords a more meaningful voice to those who have a right to participate in negotiations than does the ordinary arbitration hearing (as we shall see later). This does not mean that such unfairness is completely dispelled and, for this reason (among others), a fourth facet of the process was insisted upon.

Labour arbitration, to be effective, has to be a completely voluntary process of self-government. This means not only that the original negotiation of a collective agreement, together with an arbitration clause, must be the choice of the parties and not imposed by the law, but also that the specific decisions of the arbitrator must be voluntarily accepted to be effective. Hence, Shulman drew the inexorable conclusion that specific decisions of the arbitrator should not be legally enforceable, that the collective agreement should not be the subject of any independent legal action in the Courts and, to the extent that the parties feel they are unable to live with the substitute they have provided for economic warfare, they should be faced with the choice of reverting to the latter.

THE ARBITRATOR AS INDUSTRIAL POLICY MAKER

The "mediator" model has receded from prominence in recent years, perhaps not so much from the force of intellectual persuasion as because it has been overtaken and rendered outmoded by events. In particular, the quality of complete voluntary acceptance of the results, which appeared to be a necessary concomitant of the model, no longer adequately reflects the real, institutional character of labour arbitration. It may have been that the logic of facts in most industries precluded any effective alternative to adjudication as a mode of settling contract disputes (including the wasteful sanction of a strike). Although in the United States arbitration

is not required by law, it is so required in Canada (in Ontario explicitly and elsewhere at least tacitly). 8/ Even more important, once arbitration is adopted as part of the agreement (and it is almost universally so adopted, although perhaps not effectively resorted to, particularly in the construction industry), it has achieved substantial, independent, legal leverage. 9/

In the first place, resort to arbitration is effectively required as the primary source of relief in all cases where a collective agreement is in effect. 10/ In the second place, the decision of the arbitrator is somewhat insulated from judicial review, although the scope of review is a matter of degree. 11/ Thirdly, the arbitrators have achieved de facto, substantial, remedial authority, extending both to the award of substantial monetary damages and to the requirement of specific performance of employment contracts even where the judiciary would not so order. 12/ Moreover, these awards have become legally enforceable, either automatically (upon filing at the Court's office) or by way of a suit for enforcement with little or no review. Arbitrators thus have at their back the same coercive authority of the state as do the ordinary courts. 13/ Fourthly, the negotiation of lengthy, detailed collective agreements, and the treatment of arbitration precedents as more and more authoritative, have together created a heavily structured legal regime. 14/ Such an environment renders disputes much more amenable to settlement by enforcement of rights and duties than by ad hoc mediation and compromise. Fifthly, the arbitration process has succeeded in expanding into the same fields of activity as publicly appointed labour relations boards 15/, achieving much the same insulation from review of the substantive merits of its decisions and then utilizing the peculiar enforcement machinery of a permanent administrative agency. The last is particularly true in the United States.

All of these developments require the judgment that "voluntary" labour arbitration can no longer be considered as part of a system of self-government, of concern only to the immediate parties who instituted it and controlled only by the criterion of their continued satisfaction with it. Rather it must be treated as an institution which exercises legal power delegated from the state, power whose source is substantially statutory rather than contractual. It has been pointed out that this development in arbitration is paralleled by similar developments in our attitudes to labour unions and the large industrial firms which were the concern of the Shulman-Taylor model. 16/

For functional reasons, an ever-growing gap has been developed between ownership in the company or membership in the union and effective control of the decisions which are made on behalf of the institution. It is becoming more and more evident that it is fictional to speak of these decisions being "private" only, with their effects confined only to those who participate immediately.

Since control by the market or by the affected constituencies is no longer possible, it becomes the function of legal and governmental policy to exert some control. One available representative of the public is the arbitrator. This is particularly true in jurisdictions where the parties have no untrammelled veto on the choice of an arbitrator (for instance, where they apply to a Minister of Labour who makes the appointment rather than supplying panels of names). 17/ In Canada and in the United States, the legal and social conditions no longer permit the arbitrator to believe he can fulfill his responsibilities by ensuring that his decisions are "mutually acceptable" to each of the immediate parties. He has larger

responsibilities to the "public interest" of the society of which collective bargaining is an integral part. Out of this changing environment has emerged another model of the arbitration process, that of the "arbitrator as industrial policy maker".

This theory makes much the same assumptions about the necessarily ambiguous and "open" quality of many of the provisions of the collective agreement in so far as they apply to the types of problems raised in arbitration. If the arbitrator attempts to solve these problems, he cannot meaningfully base his decisions on principles that can be distilled from any actual, mutual agreement of the parties. Because of the legal and social developments described above, arbitrators have been delegated the power to make authoritative judgments, allocating values among the many different participants within the industrial community. The arbitrator must become conscious of his role as a "political" actor within this community and that what he decides (or even fails to decide) is a legislative choice with significant implications for all those it affects.

If this is so, the mode of decision making which the arbitrator adopts must reflect the position he occupies. He is no longer justified in using "conceptual" reasoning, deriving his conclusion from legal principles found within the agreement, the statutory or common law of the jurisdiction, or from a body of accepted, reported, arbitration precedents. The arbitrator should base his decisions on their functional relationship to what he believes to be the appropriate goals of the industrial society in whose government he is participating. Such goals include not only the maintenance of the productivity of the industrial enterprise, and the viability of collective bargaining as the technique for establishing working conditions,

but also the commitments of the wider political community to the values of due process.

Although the need for general rules applicable to more than the instant case is also a concern for the arbitrator in some cases, it must often take second place to the latter's function as a flexible resolver of disputes. The arbitration process should fairly and justly dispose of industrial conflicts during the administration of the agreement, by balancing these competing aims in individual cases while maintaining some measure of predictability in the governance of the plant, through concern for past usages, "the common law of the plant". The role of the arbitrator is peculiarly "non-legal" and, as in early equity, his "lay" judgment is sought "to focus on a specific dispute and to reflect the contemporary conscience of the community in its resolution, with both utility and integrity." 19/

The distinctive value in this model is its perception of the fact that the arbitrator himself really decides those issues which are not reached by any meaning that can be honestly attributed to the agreement. It shows the institutional significance of the fact that, while arbitrators are ad hoc appointees of the parties whose continued use is at the pleasure of the latter, the legal system as a whole has delegated them the power of making authoritative and binding judgments in the government of the major portion of the industrial and economic framework of the community. It is no longer true to say, with the "mediation" model, that "....the arbitrator has no general charter to administer justice for a community which transcends the parties. He is, rather, a part of a system of self-government created by and confined to the parties. He serves their pleasure only, to

administer the rule of law established by their collective agreement...." 20/ The "policy maker" model lays bare the legal and social power attached to the office of the arbitrator and the responsibilities to the wider public interest that this necessarily involves.

An example of a divergence between a common, private interest of union and employer and a wider community value might involve an individual employee-grievor protesting a discharge. The union might, for political reasons, be required to prosecute his grievance but would agree with the company that he is a trouble maker whose discharge is best sustained. Such an attitude could be communicated to the arbitrator, tacitly or explicitly (perhaps through the nominees). By contrast with the "mediation" model, this theory would require an arbitrator to review both the general and specific policies of the parties where they infringe on "contemporary community attitudes of what is fair in procedure and equitable in result". 21/

In fact, the whole area of union security and the effect on it of internal union procedures could become a major field of arbitral policy making in the light of community values as far as they are reflected by arbitrators. However, up to now proposals for labour arbitration activism have been concentrated in the field of "implied" restrictions on unilateral management changes in the production process as far as they affect working conditions. In assessing this role, though, it is important to remember that it is sufficiently neutral between union and management interests as to legitimize "implied" restrictions on unilateral union control over its own internal affairs as far as this affects eligibility for work. 22/

I think it fair to say that the brief flirtation in Ontario with the concept of "implied limitations" was founded on a tacit acceptance of the

values expressed in this model. Certainly the dominant United States approach 23/, as far as it picks and chooses among the different, competing interests of the parties, is logically dependent on such a model. Yet I do not believe that those who have advocated this legal theory have fully appreciated the institutional significance of the fact that the imposition of implied restrictions on subcontracting, for instance, represents an authoritative value judgment by the arbitrator, and that his choice of the appropriate term in the agreement be adequately responsive not only to the private interests of the parties represented before him, but also the private interests of the subcontractor and his employees and the public interest in a productive economy with fair conditions of employment. We shall assess later on the relative, structural capacity of arbitration to reflect adequately these various interests in its decisions. Suffice it for me to suggest now that the more or less articulate legal realism of law professors (who are now doing much of the labour arbitration in Ontario) rarely goes beyond a discussion of the substantive policies to an evaluation of the compatibility of "judicial" policy making with the institution.

THE ARBITRATOR AS ADJUDICATOR

Unlike the first two theories of the arbitrator's role, the adjudicative model rests its case largely on the design of the institution within which labour arbitration is carried on. It holds that the nature of the substantive policies which arbitrators should strive to achieve are and should be limited by the structural means within which they operate. Moreover, the maintenance of enduring institutions such as labour arbitration and the continuance of wide acceptability for its decisions is itself a sufficient reason for self-restraint, by participants in the institution

in the pursuit of substantive goals such as job security. 24/ In other words, the fact that an institution such as arbitration is presented with an opportunity to relieve against more or less apparent industrial ills, even when there is no likelihood of short-run relief elsewhere, may not justify action that is inconsistent with established expectations about the proper limits of arbitral reasoning and decision making. In the long run, the most important social value in industrial relations is the continued existence of procedures and institutions that shape and control the struggle carried on within them.

The distinctive role of adjudication is based on the assumption that arbitration is similar to the judicial process. By this I mean that there is a basic structure or framework which is common to both. However, this essential structure can be utilized in a variety of situations, official and unofficial, formal and informal, and the resulting concrete systems are not readily interchangeable. There are good reasons why labour arbitration has developed as a distinctive variant of the basic adjudicative form. Furthermore, as we shall see, the type of arbitral creativity which is perfectly compatible with the adjudication role is a far cry from that usually associated with Anglo-Canadian judging.

What are the reasons that purportedly justify the use of labour arbitration in its adjudicative form? Five are usually suggested: (1) inexpensiveness; (2) speed; (3) informality; (4) acceptability of the arbitrator and (5) arbitral expertise. Labour arbitration is generally conceded to be much less expensive than an action in court based on a breach of the agreement. Of course, litigation expenses vary widely and a simple suit for unpaid wages in a small claims court may be even less costly than arbitration. However, many of the issues brought before labour arbitration are

very complex and the alternative would probably be litigation before the High Court, which would be long and costly. Use of grievance arbitration serves much the same purposes as legal aid by enabling the union to prosecute many more grievances without too great regard to the drain on their resources.

Secondly, labour arbitration is generally considered much more expeditious than litigation. Again this is not a necessary truth, and the unavailability of chairmen, together with too great recourse to judicial review (especially on preliminary, procedural decisions) 25/, may reverse this judgment. However, because the process of selecting the arbitrator and naming the date is substantially within the control of the parties (especially if they co-operate and agree on the need for speed), it is always possible to have a quick trial and decision on those matters where delay is harmful (e.g., in discharge cases).

The informality of the process is not an unmixed blessing since it can unduly prolong a hearing and result in a "record" which is not apt for the decision about the grievance. However, it appears to me, on balance, that there is a substantial value to the usual atmosphere in the arbitration hearing where control by the arbitrator is a result of sensible judgments and not historical procedures. The process is much more compatible with the needs of the labour relations community because it both enhances their participation in an institution which is part of their "self-government" and radically diminishes the alienation of the layman from the institution of adjudication.

Perhaps the most important virtue of the system stems directly from the fact that the decision makers must be acceptable to both sides. This

is unlike the case of judges, magistrates, board members, etc., whose tenured status means they are imposed on litigants and counsel until they die or retire. Arbitrators who do not succeed in winning and maintaining the confidence of both sides in their work just do not get the opportunity to cause any further damage to labour relations. Now I realize fully well the dangers to impartiality and independence which the system of tenure is intended to guard against. Much, though not all, of those dangers are eliminated in labour arbitration by the requirement that arbitrators be accepted by the parties who are opposite in interest. Any residual cost is substantially outweighed, in my opinion, by allowing the parties to be confident that the person who decides their dispute has sufficient experience, judgment and ability to arrive at a reasonable result within the range of their expectations.

The final raison d'être of private grievance arbitration is the so-called "expertise" of the arbitrators. I should be quite specific about what I mean by this. I do not believe that arbitrators are expert labour-relations consultants who, through long experience with the parties, can solve their problems for them without reference to the agreement. Even if the parties wanted such paternalistic help (which is doubtful), arbitrators are generally ad hoc appointees and either members of the lower judiciary, law teachers, or members of some governmental agencies. They are thus not equipped for the role suggested by such as Douglas or Shulman. Rather they are experts in interpreting and applying, in an intelligent fashion, a collective agreement. By reason of long experience with this particular function, they become familiar with the labour relations "jargon" in the agreement, the underlying industrial reality, the type-problems for which different provisions are designed, and the types of inferences which should

be drawn from statements in evidence. They become adept at conducting an arbitration hearing in a way which best elicits the necessary evidence (of both adjudicative and policy facts) from the types of witnesses (and counsel) who are likely to participate. The result is an enhanced ability to decipher the correct factual background to the dispute, and imaginatively to elaborate and apply the principles and standards established by the agreement to these facts. And, I repeat, this kind of "expertise" is not imposed on the parties from the outside since they can select the kind they have already tested and which they prefer for themselves.

Despite the differences I have enumerated, I do believe the adjudicative model of arbitration suggests a basic similarity to "courts". To summarize the model very briefly, it conceives of the arbitrator as an adjudicator of specific, concrete disputes, who disposes of the problem by elaborating and applying a legal regime, established by the collective agreement, to facts which he finds on the basis of evidence and argument presented to him in an adversary process. 26/ Hence, the arbitration process mirrors the division of functions conventionally adhered to in political life. There, a legislative body establishes the rules or principles that are to govern the private conduct of those subject to its enactments. Then an adjudicative body settles disputes arising out of this private conduct by evaluating the latter in the light of these established rules and principles. The key elements defining the adjudicative model are (1) settlement of disputes, (2) adversary process and (3) an established system of standards that are utilized in the process to dispose of the disputes.

The "adjudication" model holds that the most appropriate conception of the role of the arbitrator must begin with the ordinary "garden variety"

dispute which furnishes the bulk of work for arbitration. Such disputes consist of three basic type-problems: first, issues of fact requiring a choice between conflicting versions of evidence; second, issues of evaluation of fact, applying standards such as "just cause" for discharge or "ability and efficiency" within the meaning of a seniority clause; and third, clarifying ambiguities stemming from the application of a contract provision (or two seemingly conflicting provisions) to a "marginal situation". It is with this type of case in mind that the ongoing institution of arbitration has been designed and its use to solve basic problems of labour-management conflict about change in the "unwritten area" of the agreement is typical, even in a sense, "parasitic".

Hence, the adjudicative model does not perceive the collective agreement to be as open-ended a document as do the other two models. It conceives the negotiation of the collective agreement as an attempt to subject the continuing industrial relationship to the control of a private, legal system. Law can be defined as "the enterprise of subjecting human conduct to the governance of rules". 27/ The reasons why control and direction of conduct by rules are desirable in the industrial system are much the same as underlie the desirability of the "rule of law" in the wider social and political sphere. Rules that are announced beforehand are necessary for the maintenance of any large organization and the attainment of its purposes. Otherwise, when each individual decides for himself what to do, the lack of any co-ordination in activity would result in a breakdown of the system. Not only is efficiency enhanced but also fairness. Each participant in the industrial organization is able to choose to orient his conduct in accordance with established norms, with confidence that the rules also bind those in authority who administer rewards (e.g., promotions) or penalties (e.g.,

discharge). Although adherence to established rules may have its costs because of constraints imposed on managerial discretion in the pursuit of efficiency, the institution of rules may still be considered desirable (on balance) to avoid the risks inherent in unrestricted, discretionary authority. 28/

This model, then, envisages the collective agreement as a more or less successful attempt to institute a governing legal system in the plant. The parties to the agreement are required to orient their own activity and relationships in the light of the standards established by the agreement. This does not mean that the parties are not entitled to change the rules as they go along, motivated by a sense of the need for accommodation of immediate goals in the light of long-range interests. However, the collective agreement furnishes the standards for evaluating their conduct as "right" or "wrong", "legal" or "illegal". The public or governmental recognition and enforcement of this ongoing system of rules is incidental to its degree of "legality". Sometimes there will occur clashes of interest between employer and union, arising out of private conduct initiated usually by management (although not always, as in the case of some union activities), which clashes cannot be resolved by mutual agreement (usually without, but conceivably with, outside mediation). To resolve the dispute without resort to economic warfare, and without necessarily conceding the original initiative, the parties can apply to a neutral decision maker in the process of arbitration.

It is important to note that this is how (under the adjudicative model) the institution of arbitration is activated. It is at the private initiative of one or more of the parties at interest, on the fortuitous occasion

of such a concrete, factual dispute, that the process is put in motion and the arbitrator is empowered to function. This is not a necessary social truth but it is an important and basic facet of the existing institution. The arbitrator operates only on the occasion of a conflict between the parties and only when the parties agree to use him for the purpose of resolving a disputed situation about which they have not been able to agree. The arbitrator does not act on his own initiative and has no real discretion to impose or withhold his own intervention into the parties' relationship.29/ This is a significant basis for the final conclusions of this model about the proper role of the arbitrator.

Once the arbitrator has been selected (or the Board constituted), the next problem is the manner of working of the institution. In the first place it should be noted that access to the process is limited to those who are immediate parties to the instant dispute. There are substantial problems concerning the rights of affected employees dissatisfied with union representation of their interests, or even other unions and their members (as in jurisdictional disputes). Recent cases have held that employees who might be deprived of their existing rights as a result of an arbitration decision have a right to participate in the hearing if the union takes a position contrary to their interest. Parenthetically, I might note that such a legal rule seems inconsistent with the theory arbitration under the first or second model. To allow such an employee to participate in a meaningful way is contrary to the dictates of mediation between the parties to the collective relationship. To limit access to only those employees who have "rights" under the agreement is insufficient for effective "industrial policy making". Suffice it to say for now that usually only the signatory parties to the collective agreement under which the Board is constituted—

a very limited group of employees— have a right of access to the Board. This is very important when we see what is meant by and involved in the next characteristic of "arbitration as adjudication", that it is an adversary process.

An adversary process of adjudication (by contrast with an umpire or inquisitorial system) entails a relatively passive role by the arbitrator who is expected to decide the case on the basis of evidence adduced, and reasoned arguments made, by the parties themselves. It is precisely because this is how the institutional structure is designed that it is illegitimate (within the confines of this model) to distinguish between the "artificial" facts of the case, as prepared and presented by the parties, and the "real" facts learned by the arbitrator through his resources outside the record (perhaps when his nominees "put their cards on the table"). There are various purposes served by the adversary system: (1) it decentralizes the process of preparing the case by giving primary responsibility to those who understand best their position which will be affected by a decision; (2) it preserves an aura of impartiality and neutrality for the adjudicator which would necessarily be lessened by increasingly active participation, eliciting evidence, formulation of hypotheses, etc., and (3) it enhances participation by parties in working out disputes and gives them an incentive to articulate the reasons behind their own and the other's positions. These are disserved in the long run by ad hoc evasion of this structure for short-term gains (which are themselves always debatable).

Many interesting conclusions flow from a perception of adjudication (and arbitration) as essentially "adversary" in its make-up. In the first place, we can see the necessity of a concrete dispute to furnish a relatively precise criterion for limiting the number of participants and then

for enabling these disparate participants to join issue in a meaningful way over a concrete problem. Next, we see the necessity of some type of remedy, responding to the disputed situation which is the occasion for adjudication, which will furnish an incentive to the participants in the adversary process to prepare, effectively and intelligently, the best possible case for each position. Since the arbitrator is to be relatively passive, this is necessary in order that his decision be based on an overall objective and balanced insight into the different points of view. Thirdly, we can see the reasons for the various fundamental rules of natural justice, i.e., an unbiased arbiter, a fair hearing furnished to all the parties, decision on the basis of the "record" only, defined to exclude ex parte private communications.

Most important of all, it should be obvious why "arbitration as adjudication" requires the existence of standards for decision, standards which are the objects of a shared consensus of opinion among all the participants in the process. This is due to the fact that the preparation and presentation of the case for decision is achieved by parties working separately from each other and from the person or group which is to decide the case. In order to single out and abstract from an undifferentiated concrete situation those facets which appear to be relevant to this resolution of the dispute, and argue for or against their use as reasons for a particular decision, there must be standards available which categorize certain type-situations as requiring certain legal results. For instance, suppose there is a promotion available in a plant and two people want it, and the union supports one and the company another. There must be some standards telling everybody which facets of the whole life history and present status of each that are relevant for selection between them (i.e., training or time with

the company are usually relevant; union status or marital relationship to the supervisors are usually not relevant). Furthermore, the parties, at the time they prepare the case and while they present it, must have some awareness of the standards defining the arbiter's criteria for decision in order that this enhance the quality of the results and their sense of meaningfully participating in the process. The whole institution becomes a charade, absent such a shared consensus concerning standards for decision. Since the purpose of adjudication is to maintain the legal system set up by the agreement, by settling the disputes which occur in its administration, the standards to be used are those established by the agreement.

THE ARBITRATOR'S ROLE IN THE "OPEN" OR "UNWRITTEN" AREA OF THE AGREEMENT

We can summarize the thesis of the third model as follows: the whole institutional structure of arbitration, its incidence, access to it, mode of participation in it, the bases for decision, the nature of the relief available in it, are all defined by and flow naturally from its function, which is to dispose of private disputes arising out of primary conduct by granting relief to parties on the basis of an evaluation of this conduct in the light of the "legal" standards established by this agreement.

Yet this is no answer to the theorists who proposed our first two models. They might well agree that the role of the arbitrator (all else being equal) is to apply the standards created by the agreement to the actual conduct of the parties, as established by evidence. However, their whole point is that the collective agreement by its very nature cannot and ought not to be a set of complete, established rules comprehensively covering all parts of the relationship which might give rise to dispute. It is

in these necessary, and often extensive, "gaps" in the agreement that the arbitrator is called upon (by the other models) to play his "mediatory" or "industrial policy making" role. These models accept (with some factual and normative reservations) the fact that the institutional structure of arbitration is largely modelled on the adjudication pattern and that much of the work performed by the arbitrator fits quite comfortably within the adjudicative role. However, they also contend that many of the problems can only be subject to "adjudication" if the latter is extended to the point of fiction and that it is preferable to face realistically the exigencies of this type of problem within the whole context of the process of collective bargaining. The classic example of such problems that fall within the "unwritten" area of the agreement is management's right to change working conditions unilaterally.

The response of the theories underlying the adjudicative model is two-fold. In the first place, they emphatically reject the notion that intelligent and faithful interpretation of the provisions of a collective agreement necessarily requires the existence of a specific provision intended to deal with the specific type-situation and that the adjudicator's task is merely to apply the language of such a provision (or its "plain meaning") to the fact-situation. On the contrary, they hold (i) that the meaningful interpretation and application of shared and established standards is consistent with the theory; (ii) that the provisions of a collective agreement are generalized attempts to deal with industrial problems; (iii) that the solutions proposed are necessarily abstract and incomplete, and (iv) that it is the arbitrator's function to engage in the reasoned elaboration of these "standards-solutions" in the light of the concrete problems with which he is faced. In other words, if all the parties to the

process share the same conception of the arbitrator's role, to wit, that he will intelligently discern the relevance of a general provision to a specific solution by discovering the implications of the situation for the purpose he imputes to the provision, then the parties will be able to participate vicariously in this process of reasoning. The result will be even more predictability and objectivity of the final decision than purely "literalist" or "conceptualist" reasoning, although for both there is necessarily a certain degree of arbitral fiat in many of the results. In fact, many courts in statutory interpretation, utilizing this approach, are more creative and imaginative while approaching even closer an "objective" implementation of the legislative "will" than are arbitrators, courts, or theorists about the process of administration of the collective agreement. 30/

One of the main examples of purposive types of interpretation is the treatment of statutory holidays. There are two recurring kinds of questions that continually give rise to arbitration: (1) if a holiday falls on a day which is not a regular working day (e.g., Saturday or Sunday), are the employees still entitled to holiday pay?; (2) if entitlement to a holiday depends on work on a qualifying day, and if the employee is prevented from working that day (because of lay-off, suspension, cancellation of shift, etc.), is he still entitled to holiday pay? Each of these problems might be dealt with by explicit language in the agreement but often there is no evidence the parties have directed their minds to the issue. Sometimes arbitrators make a decision based on language that is only accidentally relevant (and still somewhat ambiguous) but more often they do so by imputing a purpose to the provision and reasoning from its implications.

For instance, with regard to the holiday falling on a Saturday, the arbitrator's answer will depend on whether he views the function of holiday pay as a protection of the employees against lost wages due to loss of working time or as an additional, independent wage benefit, which is part of the total wage package. 31/ Sometimes the function intended can be spelled out from other aspects of the provision but in other cases the arbitrator is left to make a judgment as to what he thinks makes the most industrial relations sense. Similarly, regarding the qualifying day provision, just about everyone agrees that its purpose is to prevent extended absences over a long weekend by penalizing absentees their holiday pay. 32/ If this is so, the question left to the arbitrator is whether he should read into the general language of disentitlement an implied limitation when the employer has made it impossible for the employee to work the qualifying day. 33/ In each of these situations, it is perfectly consistent with the adjudication role that the arbitrator develop and elaborate the holiday pay provision in the light of what he believes are the mutually accepted purposes and premises of the parties.

In the case of "just cause for discharge" or "ability and seniority" provisions, the arbitrator is again left with problems that cannot meaningfully be resolved by looking merely at the language of the agreement and its dictionary meaning. Unlike the statutory holiday case, here the arbitrator does not really have a mutual purpose of the parties with which to reason to a conclusion. However, he is expressly delegated by the parties the task of filling in and elaborating the gaps left with these ambiguous standards. To some extent this requires decisions that are directly related to the concrete situation of the individual employee but there may also be involved issues of general principle that will be significant precedents

for other cases. 34/ Regarding the first type, the function of the arbitrator is closely analogous to that of a trial judge deciding whether a driver was negligent or how a guilty defendant should be sentenced. As regards the second, the arbitrator is required to develop a reasoned principle, the one he believes most probably justified by relevant arguments and analogies and which fits in a coherent fashion into the established body of arbitral doctrine. 35/

Sometimes it becomes obvious that the arbitrator is being asked to decide problems in an area to which the parties have not explicitly directed even an incomplete, tentative solution (although issues for arbitration extend along a whole spectrum from "interpretation" through "construction"). Not only have they not come together on a framework within which only one answer is plausibly rational, but they also have not agreed to delegate to the arbitrator the power of decision. However, there is a whole family of such problems wherein I believe it quite compatible with the distinctive role of the arbitrator that he actively develop a common law. This "family" is comprised of those issues which relate to the success of the enterprise of arbitration itself.

The most obvious such question is the very definition of the arbitrator's role in actual operation. This includes questions such as the authoritativeness of precedents 36/, the use of extrinsic evidence such as past practice and negotiating history 37/, and the use of a literal or purposive theory of interpretation. All of these are matters that are open in principle and have to be decided one way or the other so that there is a common framework to the institution within which the participants can operate. Similarly, the arbitrator must allocate the burden of proof on

different issues, as well as the burden of adducing evidence, and he must make policy judgments about the admissibility of certain types of evidence.38/ Once he has held whether or not a claim has been established on the merits of the agreement, a problem arises as to whether he has the power to award damages, direct reinstatement, substitute penalties, etc. 39/ A recurring problem in arbitration has been the significance to be attached to breaches of procedural requirements established by the agreement and the power of the arbitrator to relieve against the penalty of nullity when this is provided in the agreement. 40/

There are three reasons why I believe an active, creative role is appropriate for the arbitrator in dealing with this family of issues. In the first place, the legislature has clearly established the policy that arbitration should be the means of settling grievances. This policy is then binding on all those connected with this system in this jurisdiction and thus arbitrators are warranted in taking the steps necessary to ensure the success of arbitration by fleshing out the bare skeleton suggested in the statute. Secondly, in performing this role the arbitrator is able to act in a relatively neutral fashion between an employer and union. Although the decision in any one case will favour one side, the principles which have developed in each of the areas mentioned above are available to, and have been used by, the other party. 41/ Thirdly, common to all of these problems is the fact that they are remedial, they are related to the institution for settling questions of rights and duties of the parties, and the principles developed do not purport to control the primary conduct of these parties. Hence they do not significantly affect the substantive bargain that has been negotiated by the parties. Moreover, there are relatively well developed systems of adjudication (the Courts, the Labour Board, etc.)

from which arbitrators can draw analogies as they reason towards the most appropriate legal regime for their own institution.

However, as you proceed farther along the spectrum of arbitration issues, you reach the type of "gut problem" for which it is quite illegitimate to suppose any basic consensus among the parties as to how they should be resolved. The classic example of this issue we have already discussed—the conflict between management rights and job security in the context of subcontracting, technological change, work assignment, relocation, etc.

In effect, these are issues which are eminently bargainable, issues which can find no more objective criteria for resolution than relative bargaining strength, as finally implemented in an armistice line that defines the boundary between "unilateral managerial discretion" and "employee job security". As to these, it is improper to say there is a common purpose, first because it is not so as a matter of empirical fact and, secondly, because the whole logic of the development of collective bargaining establishes these issues as the problems for which collective negotiation and agreement is designed to deal.

For this type of problem (and again I must emphasize that it is not a clearly-defined category but rather a section of a spectrum of problems) the response of the adjudicative model to the others (mediation and industrial policy making) is "arbitral restraint". 42/ The institution of arbitration is functionally unsuited to the disposition of this type of problem because it is incapable of solution even by a creative elaboration of law. The decision of when and how to change the armistice line between management function and union control is one which itself cannot be subjected to law any more than can the decision of when to legislate.

Moreover, it is undesirable for the arbitrator to shake off the restraints of his institutional role and begin to act in a way best calculated to achieve effective mediation or industrial statesmanship. This necessary confusion of role will detract from the long range moral acceptability of the results of arbitration even when confined within its proper limits. This moral acceptability (because it is believed that such an impartial decision is "right") is greatly dependent on its rational quality and on its actual and apparent derivation from institutionally established standards or purposes. If some of this adjudicative acceptability is misused for the short-term goal of alleviating a particular problem, it will harm a social institution for decision making which is much more important than any instant, substantive results. What is necessary is a recognition that the collective agreement can only be partially successful in subjecting the industrial relations of any firm to the governance of rules, that arbitration is suited for resolving only those disputes that arise within this area (although up to and including its peripheries), and that a much more preferable institution outside this periphery is continued collective bargaining.

Before going on to consider the alternative to arbitration, which is bargaining, I will recapitulate the argument to this point. A basic demand made on arbitral decision making is that it proceed via reasoned elaboration of "objective" standards. This is seen, for example, in the desire of arbitrators to find the justification for imposing limitations on management decisions in the "unwritten" area of the agreement in "neutral" premises, such as the recognition clause, the union security, seniority, or wage provisions, or in the very fact of the agreement itself. An arbitral decision is unacceptable as a mere "fiat" of the arbitrator and finds its authoritative

force or legitimacy in the reasoned opinion that justifies it. 43/ This tendency is based on real considerations of the function and makeup of arbitration which, as we have seen, presuppose "objective" premises and standards as the starting point for arbitral argument. However, the premises relied on in the subcontracting and other analogous areas just do not have the mutually intended and established content necessary that these conclusions (limitation on unilateral change) be derived from them. Nor is the arbitrator warranted in reasoning in accordance with what he believes to be most consistent with legislative policies and standards to remake the parties' contract, for them. The legislative presumption is that freedom of contract, not compulsory "interest dispute" arbitration, is the rule. 44/ Hence, the conclusion of the third model of the arbitral process, which I accept, is that these decisions are inconsistent with a proper conception of the arbitrator's role, and that any short-run substantive gains (which themselves are quite debatable) do not justify such misuse of grievance arbitration (with possible harmful consequences for the "acceptability" of the latter).

AN INSTITUTIONAL ANALYSIS OF ARBITRAL POLICY MAKING

One final answer to this conclusion might be made by adherents of the policy-making role. Even if it is true that implied prohibitions on management initiatives cannot be justified by appeal to any neutral principles and that imposition of such restrictions is inconsistent with strict adherence to the adjudicative role, still this is not the end of the matter. As we have already seen, the present legal regime is quite unfair to the union position since the absolute, statutory, no-strike clause has totally limited union power while the collective agreement does not wholly restrict management power. Moreover, there is no real incentive for management to

bargain in this situation and thus the most appropriate substantive solution is unlikely. Secondly, the strict adjudication role may be inappropriate for arbitrators. There are some very distinctive institutional traits of labour arbitration that might legitimize overt arbitral policy making in this limited area as the least deficient of all solutions. Hence, the prima facie demands of the institutional and legal values involved may be outweighed by greater substantive gains in this case.

In deciding whether a limited "policy-making" role is suitable for arbitration, there are several dimensions along which the existing institution may be assessed: (1) accountability and legitimacy; (2) rationality and adequacy, and (3) effectiveness. 45/ At present, it seems safe to say that the institution is designed with the primary role of adjudication in mind. The issue is whether the existing structure is compatible, at certain key points, with the adoption of an overt policy-making role in this field of industrial change.

A very important factor in evaluating the legitimacy of such role is the appointment and accountability of the arbitrator. At present, the Chairman, who is the real decision maker, is selected by the parties (or their nominees to the Board) or, failing agreement, by the Minister of Labour (or rather, someone in his department). This is true of the typical arbitration hearing in Ontario which is ad hoc, whether of the tripartite or single arbitrator form. Sometimes the parties designate permanent or rotating umpires in their collective agreement. In the case of the ad hoc arbitration system, the arbitrator holds office completely at the pleasure of each of the parties. They agree to select him for each case, they can evaluate beforehand his decisional record in the type-situation involved

and, if they are displeased with his decision, can decide unilaterally never to agree to him again. In this sense arbitrators are completely accountable to union and management, a condition which may have a distorting effect because the Chairman's livelihood may depend, in whole or in part, on his continued acceptability. 46/

Hence, subject to the limitation of the residual power of the Minister of Labour, the need for accountability in labour policy making is substantially satisfied. 47/ What is not so apparent is the capacity of the arbitrator, acting within the framework of labour arbitration, to engage in intelligent development of a common law of the administration of the agreement. The vast majority of arbitration cases in Ontario are decided by men whose backgrounds are either in the judiciary, in law teaching, or on the Labour Relations Board. All these men have either legal training or essentially legal experience. They are in a position to specialize in the labour relations field and to become knowledgeable and sure-footed in dealing with the typical problems posed in labour arbitration. However, as far as industrial relations as a whole is concerned, their interest is necessarily secondary and their experience is essentially as an outsider. No one can seriously contend that, unaided, they are equipped to establish new, general policies adequately resolving the competing interests in job security and industrial change. 48/

Is the institution of labour arbitration designed to furnish this aid? The typical hearing is conducted by lawyers on either side, or by labour relations consultants and/or international union representatives, or by personnel managers and/or union local business agents. Although the industrial background to a specific dispute may be thrashed out by co-operative

discussion at the beginning of the meeting, the record for the decision is prepared through the examination of witnesses. Again I believe it a fair statement that the personnel who are now available and involved in Ontario labour arbitration are unequipped to establish with any degree of probability the disputed policy facts that must underlie a new common law of labour arbitration. 49/

Since, as we have already seen, the arbitrator does not have the expertise necessary to justify his taking "official notice" of such controverted facts, he must rely on other resources. Yet he does not have the facilities or staff that are available to legislatures or administrative agencies, enabling him to make factual studies, evaluate proposals with the aid of experts, suggest legislative hypotheses in order to get the reaction of all interested parties, and then formulate a final compromise that takes adequate account of what has been learned. Because labour arbitration has been designed as adjudication, the arbitrator is essentially passive and dependent on the efforts of the parties to prepare a record and argument for him. Because they invite him in only when a dispute arises, his policy-making activity can only be sporadic and at random. Thus he does not have the opportunity to test and amend his policies and to avail himself of information feedback for this purpose. 50/

The device that is usually suggested to remedy these obvious inadequacies in labour arbitration involves the use of the partisan nominees. Although it is obvious that, in fact, the nominees are not intended to be impartial decision makers, it is somewhat doubtful whether their role can realistically include the provision of the type of expert labour relations judgment that cannot be expected from chairmen. Often the nominees are

lawyers (in fact more often than are counsel), and at other times they are usually consultants, international union representatives, etc. As I view them, they have several valuable functions: they help ensure that the record is complete; canvass the issues for the chairman; fill in the labour relations background to the agreement if necessary; embody the threat of a dissent if the majority award does not deal adequately with all the arguments; narrow the scope of that award so that it does not affect matters unforeseen by the chairman; and write a dissent to get his side's position in the reports. I do not feel they are able to be an adequate sounding board for decisions that subcontracting is improper in certain situations. 51/

Although the accountability of arbitral policy making may be satisfied in a way that is not true of judicial policy making, neither the arbitrator's background nor his institutional environment are conducive to highly intelligent legislative action in this field. Let me hasten to add that I do believe that the process of labour arbitration does enhance greatly the probability of rational decision making in elaborating and applying the agreement to its industrial context. Here there is a framework of agreed-to principles and purposes from which we can reason to a more or less probable and plausible conclusion. However, in the job security situation we leave this penumbral area of the agreement and embark on what are, essentially, the uncharted waters of the unwritten area of the relationship. Not only is there no mutual consensus between union and management as a basis for a rational decision but the arbitrator necessarily has a distorted perspective from whence it is difficult to perceive the claims of third parties and the general public. 52/

The third problem in arbitral policy making is the likelihood of its effectiveness. If the very reason for making a somewhat "parasitic" use of arbitration in this area is our belief that it will be more successful in achieving a fairer substantive result than bargaining, we must have good reason for believing this to be true. The decision must be complied with in the individual instance, in the continuing relationship between the immediate parties and, generally, in later arbitration decisions in order that the policy-making effort be successful. At present, any such decision would run afoul of obstacles at each of these levels. Because arbitration decisions are substantially reviewable now in the Courts, their acquiescence would have to be obtained. It seems safe to say that the doctrines they now employ would render any decision limiting management rights in a clearly "unwritten area" short-lived. 53/ Even if it is not quashed, it may have little or no lasting effect. Presumably that arbitrator would not soon be selected again for that issue, at least by the employer who lost that case. It is true that some arbitrators adhere to a doctrine of res judicata as between the same parties but this is not true of all. For the latter, this again is the type of decision that is eminently reversible. Finally, since there is no appellate body in labour arbitration to settle legal issues for the system, the lack of a doctrine of stare decisis would render any new developments in this field extremely tenuous. There is no great likelihood that one arbitrator's idea of the most desirable legal regime controlling management rights will coincide with most others. The answer in any case will largely depend on the arbitrator you get. Even more significant, it is very unlikely that many arbitrators in the present system (or judges or counsel) can be persuaded of the desirability of a policy-making role at all for labour arbitration.

Hence I conclude that, even on pragmatic grounds, there is no justification for the arbitrator stepping outside his appropriate adjudicative role and donning the cloak of industrial policy maker. There is no intrinsic likelihood that he will furnish a solution to the problem of industrial change that is substantively adequate and fair or that his efforts to impose such a solution will be more than intermittently successful. He is best advised to restrain his exercise of judgment and originality to problems where this is widely conceded to be legitimate.

REFERENCES

1/ An oft-quoted pair of statements by Mr. Justice Douglas aptly demonstrates this ambiguity:

> The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts. The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law - the practices of the industry and the shop - is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.
>
> (United Steelworkers of America v. Warrior & Gulf Navigation Co. (1960) 80 S. Ct. 1347.)

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.
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> (United Steelworkers of America v. Enterprise Wheel & Car Corp. (1960) 80 S. Ct. 1358.)

2/ Fuller, "Collective Bargaining and the Arbitrator" from Collective Bargaining and the Arbitrator's Role, 8, (1962).

> One conception of the role of the arbitrator is that he is essentially a judge. His job is to do justice according to the rules imposed by the parties' contract, leaving the chips to fall where they may. He decides the controversy entirely on the basis of arguments and proofs presented to him "in open court" with the parties confronting one another face to face. He does not attempt to mediate or conciliate, for to do so would be to compromise his role as an adjudicator. He will strictly forego any private communication with the parties after the hearing.

Much of the literature relevant to this dispute is collected in Garrett, "The Role of Lawyers in Arbitration" in Arbitration and Public Policy 102 (1961).

3/ Fuller, ibid, at 9.

> This theory expects of the arbitrator that he should adapt his procedures to the case at hand. Indeed, in its more extreme form it rejects the notion that his powers for good should be restrained at all by procedural limitations. By this view the arbitrator has a roving commission to straighten things out, the immediate controversy marking the occasion for, but not the limits of, his intervention. If the formal submission leaves fringes of dispute unsettled, he will gladly undertake to tidy them up. If the arguments at the hearing leave him in doubt as to the actual causes of the dispute, or as to what the parties really expect of him, he will not scruple to hold private consultations for his further enlightenment. If he senses the possibility of a settlement, he will not hesitate to step down from his role as arbitrator to assume that of mediator. If despite his conciliatory skill, negotiations become sticky, he will follow Harry Shulman's advice and - with an admonitory glance toward the chair just vacated - "exert the gentle pressure of a threat of decision" to induce agreement.

4/ Historically, it is most closely identified with the theoretical (and practical) work of Shulman and Taylor.

The relevant items of their work include:

(1) Taylor, "The Voluntary Arbitration of Labour Disputes" (1951), 49 Mich. L. Rev. 787.

(2) Taylor, "Effectuating The Labor Contract Through Arbitration", from The Profession of Labour Arbitration 20 (1957).

(3) Shulman, "The Role of Arbitration in the Collective Bargaining Process", Collective Bargaining and Arbitration 19 (1949).

(4) Shulman, "Reason, Contract and Law in Labour Relations", (1955) 68 Harvard Law Review, 999.

(5) Shulman and Chamberlain, "The Collective Bargaining Process", from Cases on Labour Relations 1-8 (1949).

5/ Shulman, "The Role of Arbitration in the Collective Bargaining Process", cited above at 23.

6/ One of Canada's most eminent labour relations experts, Professor H.D. Woods, advocated such a theory of the arbitrator's role in a submission to the Ontario Attorney General's Committee on Labour Arbitration (1962). The virtue of compromise in labour arbitration is suggested in Arthurs, cited in Ch. I, ref. 2, at 821-23.

7/ The next few paragraphs draw quite substantially on Killingsworth and Walien, "Constraint and Variety in Arbitration Systems" from Labour Arbitration: Perspectives and Problems, 56 (1964).

8/ In Ontario, the relevant provision of The Labour Relations Act is s. 34.

9/ The United States experience to this effect is analyzed in Summers, "Labor Arbitration: A Private Process with a Public Function", (1965), 34 Rev. Jur. U. Puerto Rico 477; Jones, "Compulsion and the Consensual in Labor Arbitration", (1965), 51 Virginia L. Rev. 564.

10/ Cf. Elkington and Wallace Barnes (1961) C.L.L.C. 16,198 (O.L.R.B.), United Gas Limited (1965), 65 C.L.L.C. 16,055; Boivin, (1966) O.L.R.B. Oct. Mthly Rep. 513, Collingwood Shipyards (1967) O.L.R.B. July Mthly Rep. 376.

11/ For recent tendencies, see R. v. Arthurs, Ex Parte Steinberg, (1968) 70 D.L.R. (2d) 693, and R. v. Barber, Ex Parte Steinberg, (1968) 68 D.L.R. (2d) 682.

12/ See Palmer, "The Remedial Authority of the Arbitrator", (1960), Current Law and Social Problems 125; Imbleau v. Laskin, Ex Parte Polymer Corp., (1962), S.C.R. 338.

13/ Canadian Car and Foundry v. Dinham (1960), S.C.R. 3; on the mode of enforcement of arbitration awards, see Consumers Gas Co. 63 C.L.L.C. 15,483.

14/ There are very significant institutional reasons why following precedents is, prima facie, a desirable course of conduct for an arbitrator. (On the reasons for stare decisis, see Hart and Sasks, The Legal Process, 587-88 (tentative edition, 1958)). It enables the parties to act privately with some expectation of the rules of "law" they must apply to their own conduct, either to avoid conflicts or

to settle disputes after they arise. It enables the arbitration process to operate efficiently by disposing of issues as they come up and letting the arbitrator focus on one or a very few unsettled issues in any individual case. It furnishes some control on the process of reasoning of an arbitrator, who must write an opinion justifying what he has done in relation to his colleagues, and the resulting "objectivity" in his reasoning tends to make his decision more acceptable. These and other reasons give precedents a claim which requires compelling substantive reasons before they are ignored.

Three caveats are in order. First, these reasons for precedent do not justify a rule that all precedents must be followed always (or except in certain, defined circumstances). In fact, these same reasons may not permit but require the ignoring of an unwise precedent. Second, the rule in a precedent does not inhere in its words taken out of context, but rather in the reasons which caused it to be adopted, and the rule must be applied only so far as its reason extends. Third, in arbitration there is no hierarchy (save perhaps in limited judicial review) which establishes precedents that should not be re-examined at lower echelons of the process. Rather, precedents are established differently in existing contractual relationships, industries, and grievance arbitration as a whole. (Wickett and Craig, 13 L.A.C. 363 (Arthurs)). Instead of a single appellate decision establishing a rule for lower courts, a precedent becomes established only when a consensus, or prevailing climate of opinion, comes into existence among arbitrators (as in Russelsteel Ltd. 17 L.A.C. 253 (Arthurs)). When it does, the parties should be able to rely on its continued existence, so long as the reasons for precedent and for this particular rule still obtain, even if an individual arbitrator would decide the other way if the matter was presented to him de novo.

15/ John Inglis & Co. Ltd. (1952), C.L.L.C. 17,049 (O.L.R.B.).

16/ There is a great deal of literature concerning this development, especially the work of Adolf Berle and J.K. Galbraith.

17/ Cf. sec. 34(4) The Labour Relations Act of Ontario.

18/ I have based my second model largely on a paper by Edgar Jones, "Power and Prudence in the Arbitration of Labor Disputes" (1964), 11 U.C.L.A. L. Rev. 675, and have quoted extensively from it in developing the model. I believe it closely resembles the tacit and explicit assumptions of a great many other arbitrators and theorists. However, the model is valid only to the extent that it does accurately depict such tendencies.

19/ Jones, cited above, at 712.

20/ Shulman, "Reason, Contract and Law", cited above, at 1016.

21/ Jones, cited above, at 741. Two recent decisions of the Ontario Court of Appeal deal with this general problem, though not in a uniformly satisfactory way. They are: Hoogendoorn and Greening Metal Products Ltd., (1967), O.R. 712, Bradley and Ottawa Professional Fire Fighters

(1967), 2 O.R. 311. These two decisions raise several interesting issues within the scope of this article. The first held that if an arbitration hearing is convened to hear an employee's claim to a certain job benefit (via seniority, for instance), then the incumbent, the employee presently enjoying that benefit, has a right to be notified of, and to participate in, the hearing. Hoogendoorn held that if an employee's interests will be disposed of in accordance with a general interpretation of the agreement (the union seniority clause), and the arbitration convened to make this decision was really intended to deal with this particular employee, then he also has the same rights. The general principles used are (1) that employees may have distinct interests from those of the union, and (2) the rules of natural justice preclude reliance on the employer to protect these interests.

Several facets of these decisions are noteworthy:

(i) the decision in Hoogendoorn shows how judicial control of union security and union membership is largely confined to procedural matters;
(ii) the underlying thesis has to be that contracts create rights which are enjoyed by employees and that arbitrators are supposed to enforce and implement these rights, and not perform some other functions for the parties to the agreement;
(iii) the adversary process demands that parties with distinctive interests in a dispute under the agreement have an effective right to appear and present their own case;
(iv) however, the Courts have not yet faced the question of whether an arbitrator appointed and paid by employer and union can or should be able to determine the fate of others affected by his decision, e.g., an employer or another union (cf. Victoria Machinery Depot, 60 C.L.L.C. 15,283);
(v) nor have they begun to draw the lines around the right to participate which are necessary in order that the adversary process function efficiently or at all. The device of the representation order may have to be developed by the arbitrator in order to prevent a breakdown of the process in seniority cases;
(vi) such a device is of a limited value, though, in affording a voice in the arbitrator's decision to the various interests which can be affected by any policy-making decisions. For instance, neither the outside contractor, nor his employees, nor the union representing them, would have a right to appear and speak to a decision about implied limitations on subcontracting. It is problematic whether an employee affected has the right to appear independently in an arbitration hearing dealing with an assignment of work outside the bargaining unit. I suggest that the distorted perspective of the arbitrator, who views the issue as a battle between employer and union-employees, is a good reason against his assuming the role of industrial policy maker.

22/ Although management requests for "implied" limitations on union initiatives affecting conditions of employment will be rare, one prime example concerns the refusal to admit to, or the expulsion from, membership of an employee where membership is a condition of employment. Union security clauses may legally require union membership as the price of employment under the agreement (See sec. 35 of The Labour Relations Act of Ontario). If the clause requires such membership as

a "condition of employment", the employer will be obliged to discharge the non-member employee (Orenda Engines, 8 L.A.C. 116 (Laskin)). In the absence of such specific language, the bare presence of a maintenance of membership clause has sometimes been interpreted as requiring discharge as a remedy or penalty to make it meaningful (Northern Miner Press, 8 L.A.C. 251 (Laskin)). In other cases it has been interpreted strictly (Joy Mfg. Co., 6 L.A.C. 149 (Anderson); Franklin Mfg. Co. Ltd., 12 L.A.C. 327 (Reville); British American Bank Note Co. Ltd., 16 L.A.C. 49 (Hanrahan)). More important, it has been held that (1) the union has power to expel a member for reasons not specifically prohibited by statute, common law (See S.I.U. v. Stern (1961), 29 D.L.R. (2d) 29 (S.C. of C.), or collective agreement, but (2) it must prove that the employee has really been expelled from membership in the union in accordance with the rules of the latter. (Orenda Engines, cited above.) The similarity of this result to the "restrained" application of the agreement in the subcontracting situation is striking, especially when it is noted that the decision was from Professor Laskin. There has not been, and I would argue there should not be, a move among arbitrators to infer that a union security clause gives an absolute right to union membership, nor even a right where an arbitrator's conception of public policy and due process believes it is warranted. This has been left to the process of statutory enactment or private negotiation of the agreement.

23/ As reflected in the quote from Wallen's paper in ref. 66 (Ch. I).

24/ Cf. Cox, "Procedure and Creativity", from Labour Arbitration: Perspectives and Problems, 252 (1964); Seward, "Arbitration in the World Today", from The Profession of Labour Arbitration, 66 (1959).

25/ I refer here to two decisions of my own, Union Carbide and Hoar Transport, each of which involved preliminary questions of procedural time limits. The employer sought review of the preliminary decision in each case, via "prohibition", without waiting to see if the final, substantive decision went against him. As a result, the hearing of the merits has been held up for well over a year. One of the cases involves a grievance over a discharge, the other a promotion, each involving accumulating liability for back pay.

26/ I am basing the third model on the work of Professor Fuller on the theory of adjudication, especially his unpublished paper "The Forms and Limits of Adjudication". This was utilized by him in the article cited earlier at ref. 2.

27/ Fuller, The Morality of Law, 96 (1964).

28/ A good example involving seniority clauses is suggested in Shulman, "Reason, Contract and Law..." at 1005-06.

29/ In fact, an arbitrator is even more powerless than a Court since his office is completely ad hoc and at the pleasure of the very parties to be affected by his decision.

30/ Fuller, in "Collective Bargaining and the Arbitrator", cited above, at ref. 2, makes the point that the courts are often more creative in their interpretations of contract language than arbitrators. The analogous case of statutory interpretation is open to substantial judicial creativity without offending the dictates of the third model. Cf. Witherspoon, "Administrative Discretion to Determine Statutory Meaning: The Middle Road", (1962) 40 Texas L. Rev. 751. A good recent example is the job of statutory interpretation performed in Sidmay Limited v. Wehttam Investments (1967), 1 O.R. 608, esp. 616.

31/ See Silverman & Sons Ltd. (Sudbury), 18 L.A.C. 224, (Weiler), for a discussion of these decisions.

32/ See Cockshutt Plow Co. Ltd., 2 L.A.C. 788 (Cross).

33/ See Wickett and Craig (Weiler), (1968), unreported, for a full discussion of the various type-situations and the various cases.

34/ A recurring issue in discharge or discipline cases is the propriety of a penalty for incurring a garnishee; See K.V.P. Co. Ltd., 16 L.A.C. 73 (Robinson). In seniority cases, the applicability of these provisions to inventory taking has given rise to many arbitration decisions: See Sunbeam Corp. (Canada) Ltd., 17 L.A.C. 310 (Weiler).

35/ For a detailed discussion of the nature of adjudicative reasoning, See my article "Two Models of Judicial Decision-Making" (1968), 46 Can. Bar Rev.

36/ See Wickett and Craig, 13 L.A.C. 363 (Arthurs).

37/ I have discussed the relevant cases in my as yet unreported decision, Falconbridge Nickel Mines (Weiler) (1968).

38/ Arbitrators must make policy decisions about the desirability of using evidence by affidavit where there is no possibility of cross-examination, the use of statements made in grievance proceedings that might be construed as admissions, similar fact evidence to establish the breach of a rule, etc.

39/ Polymer Corp., supra, ref. 12; R. v. Arthurs, Ex parte Port Arthur Shipbuilding (1967), 62 D.L.R. (2d) 342. The latter decision has been reversed by the Supreme Court of Canada in an opinion rendered after this work had been prepared. The Court seemed to say that the arbitrator has no power to review employee 'discipline' by assessing the extent of the penalty in the light of the seriousness of the offence, the record of the employee, etc. Once some ground for any form of discipline is found, the employer is given a completely untrammelled power to select the form of punishment to be inflicted. Of course, as has been said, the validity of a good argument is not affected in the least by the failure of some court to follow it. Quite the contrary in this case where the Court gives us no reason at all for adopting a theory analogous to giving magistrates the power to impose punishment (or discharge) for a first parking offence (or, e.g., a profane epithet

used in a dispute with a foreman). Nor does Mr. Justice Judson see fit to respond at all to the fact that the contrary position commands almost universal acceptance among arbitrators (see cases cited in K.V.P. Co. Ltd., 16 L.A.C. 73, at 96-98 (Robinson)), that this forms the 'climate of opinion' in which present agreements have been negotiated, and that it was extensively defended by the majority in the Court of Appeal. Acting on the assumption that they had the power to assess the seriousness of a penalty for a particular offence, arbitrators have developed 'doctrinal' approaches using such factors as company provocation (Aerocide Dispensers Ltd., 16 L.A.C. 57 (Laskin)); unjustified discrimination in penalties applied to equal offenders (Long Sault Yarns, 1968, unreported (Curtis)); the record of an employee and the likelihood that he will be re-employed (The Steel Equipment Co. Ltd., 14 L.A.C. 356 (Reville)). If some of the statements in this opinion are given the reading they appear to demand, this whole work must go by the board. One can only hope that the ambiguities left in the Court's opinion will be used by arbitrators and courts to limit the reach of this decision and that, when the question again is brought to the Supreme Court, a future panel will distinguish this admittedly rather extreme case on the facts and consign the opinion to the oblivion it deserves. Suffice it to say that in this case, and the one referred to in the next reference, the Court appears to have adopted the narrowest form of legalistic adjudication as the appropriate model for labour arbitration in this country. If it succeeds in implementing this policy, the result may be a mortal blow to the success of the institution. That it should do so without any form of reasoned attention to the issue in its opinion constitutes a total abnegation of the appropriate role of a Supreme Court in our society.

40/ See Toronto Parking Authority, 17 L.A.C. 37 (Arthurs), utilizing s. 86 of The Labour Relations Act. The use of the principle which was first formulated in this case was held improper by the Supreme Court of Canada in R. v. Weiler, Ex parte Union Carbide, delivered on the same days as the Port Arthur Shipbuilding case. The fact that my decision was overturned in the Union Carbide case makes any comment by me upon it inappropriate, and perhaps unnecessary.

41/ For instance, damages can be awarded for the benefit of employers hit by illegal strikes or employees who are illegally discharged. Although, usually, it is unions who get the benefit of a rule relieving against the voiding of a grievance for untimeliness, I recently decided a case in favour of a company which arguably dismissed an employee in a procedurally improper fashion. The same principles would benefit the company in such a case.

42/ A good analogy, I believe, is the field of strikes and picketing, where judicial restraint should have been the policy of the Courts. I believe the exercise of judicial power to render secondary picketing illegal in Hersees of Woodstock v. Goldstein (1963), 2 O.R. 81 (C.A.), was just as unwarranted as would be arbitral limitation of employer initiatives. See Arthurs, "Challenge and Response in Labour Relations" (1967), 2 U.B.C. Law Rev. 335, 345-47.

43/ On the notion of "legitimacy" as applied to adjudication, see Friedman, "On legalistic Reasoning - A Footnote to Weber", (1966) Wis. L.R. at 158 et seq.

44/ Cf. Wellington, "Freedom of Contract and the Collective Bargaining Agreement", (1964) 112 U. of Pa. L. Rev. 467.

45/ In my article referred to in ref. 35 above, I have formulated in detail the implications of a policy-making role for judicial decision makers. The following is an application of some of these conclusions to the specific case of labour arbitration.

46/ It has been suggested that such a dependence is a serious defect in labour arbitration because the decision may reflect a desire to remain acceptable rather than a rational examination of the merits of the case. On the other hand, the need to remain acceptable to both opposing parties may evidence just that degree of objectivity and rationality that is desired. This may be only partially true, though, as complaints about "compromise" awards suggest, and especially where the interests of third parties are vitally concerned.

47/ In tentatively accepting this, I do not mean to suggest that the participants in the process would concede the legitimacy of an overt policy-making role simply because the maker of the policies holds office at their pleasure. In fact, the contrary would emphatically be the case if my informal soundings in Ontario are a fair indication.

48/ A different (and, I believe, somewhat romantic) view of labour relations decision makers is suggested in Arthurs, "Developing Industrial Citizenship", cited above at ref. 2, at 815-18.

49/ Indeed, it is doubtful whether the adversary process itself is a reasonable means of discovering "policy" as opposed to "adjudicative" facts.

50/ As would be possible for a continuing administrative agency such as the Ontario Labour Relations Board, where it utilizes non-adjudicative procedures; Arthurs, cited above, at 818 ff.

51/ An interesting question is whether the values in the use of nominees are worth the effect of increased cost and delay in the peculiar virtues of labour arbitration. It seems to me that the parties should provide in the agreement for the use of either the tripartite or single arbitrator forum as the presumptive choice, but agreeing for each case if it is sufficiently significant to warrant use of nominees.

52/ In this connection, the earlier discussion of the effects on third parties of arbitration decisions in the job security field and the limited scope of the Bradley and Hoogendoorn doctrines is very relevant.

53/ Any decision in Ontario which has an error of law on the face of the record is reviewable in certiorari. Any interpretation of the agreement which is "unreasonable" is an error of law. See R. v. Barber, Ex parte Steinberg (1968), 68 D.L.R. (2d) 602.

CHAPTER III

AN INSTITUTIONAL ALTERNATIVE: COLLECTIVE BARGAINING ABOUT INDUSTRIAL CHANGE

THE BASIC PREREQUISITE - NEUTRALITY OF THE LAW

I have argued that the type of limitations imposed by arbitrators on management initiatives are often a misconceived resolution of the conflicting interests involved. Even if they are, on occasion, an adequate substantive policy, I have suggested that the authoritative choice of such a policy is beyond the limits of a properly defined role for the arbitrator. Arbitration, because of its institutional and functional character, is suited for problems whose resolution can be achieved by the elaboration and application of established standards. Mutually-accepted standards that could afford a sufficient basis for a reasoned solution to this problem simply do not exist in the conventional case of unilateral changes in working conditions.

I hope that my attempted justification of these conclusions has not been misinterpreted as a brief for the present legal regime. The existing institutional arrangements are radically deficient because they do not allow the interests of union and employees a fair access to the decision-making process. They constitute a disincentive to the use of the technique of free collective bargaining which, after all, is the statutory policy for establishing working conditions. Moreover, because collective bargaining has given way almost completely to the unilateral prerogative of management, the substantive policies that have become established over a large portion of the economy are totally inadequate.

What is needed is a set of arrangements that allows the law in arbitration to be neutral as between the claims of union or management in this area. At present, the existence of the statutory, absolute no-strike clause imposes a limitation on the employees' power to respond to employer initiatives and this furnishes a powerful attraction to arbitrators to imply a similar limitation on management's power to take these initiatives. We want a device that will allow arbitrators to declare in a meaningful fashion that, although employer conduct is not legally prohibited, neither is it legally permitted. Arbitrators should be able to declare such conduct legally neutral 1/, not vindicated or legitimated by the contract. In order to do so, the legal regime must be changed to require effective bargaining about employer-instituted changes in working conditions. Not only will this preserve the neutrality of the law of labour arbitration in the eyes of the participants but it will also give rise to fairer and more adequate substantive policies, tailored to the needs of the individual enterprise and bargaining unit. There will no longer be an incentive for arbitrators to engage covertly in what amounts to compulsory, interest-dispute arbitration in this area.

At the present time, three factors combine to deter effective negotiation about industrial change and its effect on working conditions. In the first place, when the parties enter into a collective agreement their duty to bargain ceases, notwithstanding the fact they have not, in fact, reached agreement about many issues. Second, even if negotiations were to take place they can easily become a charade because the unions have lost, under the statute, their reserve power to enforce concessions. Thirdly, the fact that arbitrators have been forced to uphold the management claim to unilateral, residual rights, makes it harder, psychologically, for management to agree to limitations on these "rights".

The logical solution to these problems is relatively simple, in principle, although there are many difficult questions of detail that must be settled. The duty to bargain must be held to continue during the term of a collective agreement in a meaningful way. Mr. Justice Freedman proposes that management should have the right to make unilateral changes in working conditions (more specifically, to institute run-throughs) only after negotiation with employee representatives. If agreement is reached, the changes can be made at any time. If agreement is not reached, then management is prohibited from acting unilaterally during the term of the agreement and must wait until it expires. The reason is that only then can the union protect its interests with the response of a strike (or the threat of it). Compulsory arbitration is undesirable as a means of resolving this dispute, or of any other "interest" dispute. However, during the term of the agreement there should be available to either party arbitration of the question of whether the proposed change "materially" alters working conditions. The freezing of the status quo during the term of the agreement should extend only to such "material" changes.

Before evaluating the Freedman proposals, and making my own recommendations, I will sketch the outlines of a regime of law that now obtains in the United States and which does in fact implement the basic thesis of this work and that of the Freedman Report. Such a sketch, I believe, will be particularly helpful because it will remove the vagueness of these proposals and will show the concrete problems that will arise under such a system and how they can be intelligently resolved. I will then deal with some specific problems in transplanting a legal duty to bargain during the term of a collective agreement into the Canadian legal and social context.

THE UNITED STATES EXPERIENCE

There are three different doctrinal strains that have coalesced in the United States legal regime under discussion, all three of which find their ultimate justification in the following sections of the National Labor Relations Act:

> Sec. 8(a) (5) It shall be an unfair labor practice for an employer -
>
> To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> Sec. 8(d)
>
> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession:....

The first such doctrine is that an employer is forbidden from making a unilateral change (whether increase or decrease) in the terms and conditions of employment of his employees who are represented by a union with which he is under a duty to bargain. 2/ Such action is, per se, an unfair labour practice, not in the sense that it is always and automatically so but that it is sufficient by itself (or without regard to the totality of circumstances pointing to "bad faith") to raise a rebuttable presumption of a failure to bargain in good faith. It is such because it is a failure to bargain at all and must be justified affirmatively by the employer in ways we shall discuss later.

The policy reasons for such a rule are several. First, the basic assumption of good faith bargaining is that it be collective, that it be carried out by the bargaining representative selected by the majority of the unit employees. Hence the employer initiative smacks of a return to the system of unilateral employer imposition of terms and dealing with employees individually. Second, it necessarily tends to detract from the position of the authorized bargaining agent and the system of collective bargaining. To the extent that collective bargaining is considered desirable as a means of granting some participation to employees in formulating their own destiny, and that the institution of union representation is considered a necessary means for achieving these ends in the face of the employer's economic power, such unilateral action must be considered prima facie wrongful. For instance, if sub-contracting unilaterally is lawful, the union can be presented with the fait accompli of a signed contract with a third party employer and efforts to negotiate the work back into the bargaining unit will encounter an almost insuperable barrier. Unilateral action should be legally privileged only if the desirability of affording the employees a chance to participate in a mutual, reasoned deliberation about, and settlement of, their employment problems is itself outweighed by competing employer interests in unilateral freedom and flexibility. (And then, the union and employees should be required, and allowed, to combat it by economic coercion.)

Such justification can be found and is the basis of certain defences to the prima facie breach. 3/ In the first place, if the employer has engaged in good faith bargaining, entered into with an open mind and a willingness to agree on terms he finds favourable, and if such bargaining results in an "impasse", he is entitled to act unilaterally thereafter.

The duty to bargain does not entail an obligation to agree, nor does it require bargaining after it is reasonably believed to be futile. Thereafter the employer is entitled to institute any such unilateral changes in working conditions on the basis of which it has been willing, and has offered, to agree with the union. There is a real necessity to prevent the duty to bargain having the effect of permanently preventing change and, since the purposes of the duty to bargain have been served, there is no significant countervailing interest.

Another developing category of justification is that of "necessity". If the employer is not motivated by anti-union considerations, and if emergency conditions create a necessity for an immediate decision, then the employer will not be required to suffer substantial economic harm as a result of being required to delay implementing his decision while bargaining. One obvious example of this is the case where the employees have gone on strike and the employer wishes to change his operations by subcontracting his work so as to remain in business and improve his bargaining position. Such a position is legitimate and, so long as the decision to subcontract is not permanent, this "necessity" will legitimate the unilateral decision. 4/ This defence of pressing "economic necessity" becomes more and more important as the types of unilateral decisions which are prima facie unlawful are extended further and further into the area of "entrepreneurial prerogative". Moreover, perhaps it is legitimate to weigh the values of bargaining and the different results likely to be achieved from it (legitimate results, not just delay), against the more or less harmful effects on the employer.

The second, relevant, doctrinal strain is the development of the meaning of the phrase "terms and conditions of employment" which must be the subject of bargaining. Legitimate objections might be made to some facets of National Labor Relations Board (N.L.R.B.) intervention in this area, especially in so far as it prohibits bargaining to an impasse; first about a "non-mandatory" issue 5/ or, second, perhaps about a desire to get unilateral control over an issue. There is something to be said for the parties voluntarily agreeing as to which matters are to be subject to the final decision of management (e.g., type of product) or union (standards for membership), and which are to be subject to joint control. However, it still is legitimate, before such agreement or an impasse in bargaining about it, for the Board to prohibit unilateral, management decision about which matters it will exclusively control. Hence the Board must interpret the statute to decide which management decisions must be the subject of good faith bargaining before unilateral decisions to change employment conditions are made (although the Board's decision may, and should be, confined to this purpose only).

In Fibreboard v. N.L.R.B., the United States Supreme Court decided that at least some subcontracting could be construed to come within the phrase "conditions of employment". 6/ In effect, what the Court held was that some managerial decisions, even when taken for purely economic reasons, can have such an effect on tenure of employment or job security (because they change the number of jobs available) that bargaining is required. The Court specifically confined its decision to the contracting out of maintenance work which did not alter the company's basic operation. Where the work was still performed in the plant, no capital investment was required and the substitution of existing employees was for reasons of labour

economies (reduction of work force, decrease of fringe benefits and elimination of overtime payments). However, it noted that management decisions that have an effect on employee job security extend along a continuum from choice of product to price policies, to location of plants, to choice of production processes, to assignment of workers. As to all of these, the employer has a more or less decisive interest in exclusive and flexible discretion. As to each of these, the employees may also have a valid interest in negotiating mutually acceptable alternatives to changes that may harm them. Employee interests (outside wages and hours) also extend along a spectrum from relief periods to safety conditions, to work loads, to discharge, to seniority, to retirement, to job security. One balance was suggested by Mr. Justice Stewart:

> While employment security has thus properly been recognised in various circumstances as a condition of employment, it surely does not follow that every decision which may effect job security is a subject of compulsory collective bargaining. Many decisions made by management affect the job security of employees. Decisions concerning the volume and kind of advertising expenditures, product design, the manner of financing, and of sales, all may bear upon the security of the workers' jobs. Yet it is hardly conceivable that such decisions so involve "conditions of employment" that they must be negotiated with the employees' bargaining representative.
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> In many of these areas the impact of a particular management decision upon job security may be extremely indirect and uncertain, and this alone may be sufficient reason to conclude that such decisions are not "with respect to...conditions of employment". Yet there are other areas where decisions by management may quite clearly imperil job security, or indeed terminate employment entirely. An enterprise may decide to invest in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. If, as I think clear, the purpose of sec. 8(d) is to describe a limited area subject to the

> duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area....
>
> This kind of subcontracting falls short of such larger entrepreneurial questions as what shall be produced, how capital shall be invested in fixed assets, or what the basic scope of the enterprise shall be. In my view, the Court's decision in this case has nothing to do with whether any aspects of those larger issues could under any circumstances be considered subjects of compulsory collective bargaining under the present law.
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> I am fully aware that in this area of automation and onrushing technological change, no problems in the domestic economy are of greater concern than those involving job security and employment stability. Because of the potentially cruel impact upon the lives and fortunes of the working men and women of the Nation, these problems have understandably engaged the solicitous attention of government, of responsible private business, and particularly of organized labor. It is possible that in meeting these problems Congress may eventually decide to give organized labor or government a far heavier hand in controlling what until now have been considered the prerogatives of private business management. That path would mark a sharp departure from the traditional principles of a free enterprise economy. Whether we should follow it is, within constitutional limitations, for Congress to choose. But it is a path which Congress certainly did not choose when it enacted the Taft-Hartley Act. 7/

The Board has been faced with many recent decisions about the scope of the duty to bargain about management decisions. Some courts have suggested that, because of the Supreme Court holding in N.L.R.B. v. Darlington 8/, decisions to close down an operation, wholly or in part, are not bargainable absent an intent to "chill unionism". 9/ This seems a confusion of one's rights to make a discriminatory decision under sec. 8(a)(3) of the National Labor Relations Act (N.L.R.A.) and one's rights to make a bona fide decision, unilaterally and with no notice or bargaining, under sec. 8(a)(5). A more acceptable distinction would look at the nature of the decision made and the likelihood of fruitful bargaining about it. The Eighth Circuit in N.L.R.B. v. Adams Dairy 10/ fastened on the fact of the closing down of an entire part of the company's operations (its distribution system) and held

its decision in favour of subcontracting was not bargainable, while the Fifth Circuit disagreed in N.L.R.B. v. American Mfg. of Texas. 11/ The same Court required bargaining about discontinuance of the whole processing and packaging of cheese operation (and substitution therefor of the purchase for resale of the finished product). 12/ But, the Third Circuit, in N.L.R.B. v. Royal Plating and Polishing 13/, refused to require bargaining about partial closing where this was not due to labour economies.

On the other hand, the Board will find a duty to bargain (perhaps easily satisfied) about automation and technological change 14/, sale and closing down of business 15/, transfer of work from one company plant to another 16/, and plant relocation with or without partial sale. 17/

Perhaps it is not fruitful to enquire about the types of management decision (or results for employees) but rather whether the basis for any such decisions involves factors such as labour costs that are amenable to collective bargaining. 18/ Hence, if the reason for the decision to drop a product line is a drop in demand, this is not bargainable despite its effects on the employees. However, if the reasons for discontinuance are excessive costs, this is bargainable if labour cost is involved. On the other hand, it is difficult to distinguish investment and employment decisions or matters of employment efficiency (more effective utilization of labour), from matters of employment economy (labour at a lower cost). 19/ Hence, one should presume in favour of bargaining wherever the employer decision involves costs to be borne by the employees and then let it reach a quick "impasse" if bargaining is to be unfruitful.

What are the arguments for and against this requirement of bargaining before the decision is made and the union is faced with an effectuated

operating change? Why not let the decision be implemented and require bargaining with the union only about its effects on the employees?

Employers' representatives have argued that the function of the union is to protect its employees against the harmful effect of technological change and that only management has the economic and technical knowledge that qualifies it to make intelligent decisions about the desirability itself of changes in operations. It is in the long-run interest of both the economy generally and the individual enterprise, that such decisions be made only on the basis of such economic and technical considerations. The individual, affected employees depend for their jobs, in the long run, on a productive economy and a profitable enterprise, and the union should be confined to negotiating about how best to mitigate the short-term impact on the employees of the dislocation involved. Moreover, there are some real costs to the employer in requiring such negotiation. Not only does it tend to divert the decision-making process from the most rational course (by introducing "extraneous" considerations) but the fact that notice must be given of only a tentative decision can cause substantial embarrassment to the employer. It is preferable from his point of view to be able to present a fait accompli to his employees, his customers, or his locality, and thus avoid instability in his relations with each while negotiations proceed to an impasse. This need for secrecy seemingly is incompatible with any premature disclosure to the union for purposes of meaningful negotiation before the decision is actually taken.

Unions respond that the immediate interests of employees likely to be affected by changes in working conditions must be considered as very relevant to the desirability of the changes themselves. In our present

"affluent society" it is not sufficient to say that long-term gains in economic productivity and efficiency favour a change and that immediate "human" costs must be disregarded as a countervailing factor. It is also not too helpful to speak of "management" exercising the traditional prerogatives of "ownership" in unilaterally deciding how best to organize and dispose of the productive assets of the firm. The interests of the employees must be considered as one of the "constituencies" 20/ which will be substantially affected by any changes to be made. These interests can only be effectively presented if the employees' own representative can play an active part in the original formulation of the decision. Only in this way will the desirability of various alternatives which minimize employee dislocation (as opposed to compensating for it after it occurs, through severance pay, etc.), be actively considered and have some real chance of being adopted. I should emphasize that negotiation is necessary before any final decision is made. It imposes too heavy a burden on collective bargaining to require it to overturn consistently decisions that have already crystallized within management echelons (together with the reasons and rationalizations for them). Hence the policy of the law should be that no decisions that have a substantial effect on employee interests should, a priori, be excluded from the process of collective bargaining that has been adopted as the national policy for protecting employee concerns. Only if in particular cases it seems that the gains of negotiation are substantially outweighed by the costs should decisions about them be conceded to management's unilateral power.

A third and final doctrinal development is necessary to complete the basic framework of this legal regime. So far, we have seen that the employer is prohibited from unilaterally changing working conditions without

bargaining with a union (before impasse or where possible) and that such "working conditions" include managerial decisions affecting job security. Does the existence of a collective agreement change this? At one time, the United States rule imposed a continuing duty to bargain despite the existence of an agreement and even about the change of provisions in the agreement. This was based on a philosophy that the collective bargaining relationship was a continuing one requiring mutual discussions and accommodations over changing conditions and that it should not be overly rigidified by the terms of the agreement. 21/ The opposing view, that stability in the relationship required predictable guidelines within which each pursued its own interests and intelligently solved problems and conflicts by administering the agreement, won out by the enactment of sec. 8(d). 22/ In effect, this enabled the employer to satisfy his duty to bargain about grievances by channelling them through the grievance procedure and arbitration and relying on the existing agreement during its term.

Yet it is obvious that the collective agreement, even given creative interpretation, could not and ought not to establish standards for the administration of all grievances. Three attitudes became possible about the duty to bargain in such a situation. The first is the attitude of the Eighth Circuit in N.L.R.B. v. Nash-Finch: 23/

> We consider untenable the position of the Board that, although the respondent had assumed no contractual obligation to continue the insurance and bonus benefits which it had formerly provided for the employees represented by the Union, the respondent was obligated by law to continue such benefits unless and until it terminated them after further bargaining with the Union.
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> . . . . . .
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> Where parties to a contract have deliberately and voluntarily put their engagement in writing in such terms as to import a legal

obligation without uncertainty as to the object or extent of such engagement, it is conclusively presumed that the entire engagement of the parties and the extent and manner of their undertaking have been reduced to writing.

The following language from Printing &c Co. v. Sampson L.R. 19 Eq. 462, 465, has several times been approved by the Supreme Court of the United States: "* * * if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice".

The respondent, we think, may not be convicted of an unfair labor practice for doing no more and no less for its union employees than its collective bargaining agreement with them called for. "And it is * * * * clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements". National Labor Relations Board v. American National Insurance Co. 343 U.S. 395, 404. Whether the clause proposed by the Union requiring the maintenance of existing standards of employment was "an issue for determination across the bargaining table, not by the Board".

It seems to us that what the Board has done, under the guise of remedying unfair labor practices, is to attempt to bestow upon the respondent's union employees the benefits which it believes the Union should have obtained but failed to obtain for them as a result of its collective bargaining with the respondent on their behalf.

We have discussed sufficiently the fallacies in this position, which are enhanced in Ontario by the compulsory, absolute, no-strike clause in every agreement.

A second attitude 24/ is that the "unwritten" area of the agreement is to be governed by the status quo at the beginning of the agreement. The status quo would include both substantive terms of employment and also existing procedures utilized for making regular changes in these conditions. The basic policy reasons underlying this attitude were spelled out by the dissenting Board member in Jacobs Mfg. Co. 25/

It is well established that the function of collective bargaining agreements is to contribute stability, so essential to sound industrial relations. Contractually stabilized industrial relations enable employers, because of fixed labor costs, to engage in sound long-range production planning, and employees, because of fixed wage, seniority, promotion, and grievance provisions, to anticipate secure employment tenure. Hence, when an employer and a labor organization have through the processes of collective bargaining negotiated an agreement containing the terms and conditions of employment for a definite period of time, their total rights and obligations emanating from the employer-employee relationship should remain fixed for that time. Stabilized therefore are the rights and obligations of the parties with respect to all bargainable subjects whether the subjects are or are not specifically set forth in the contract. To hold otherwise and prescribe bargaining on unmentioned subjects would result in continued alteration of the total rights and obligations under the contract, thus rendering meaningless the concept of contract stability.

That a collective bargaining agreement stabilizes all rights and conditions of employment is consonant with the generally accepted concept of the nature of such an agreement. The basic terms and conditions of employment existing at the time the collective bargaining agreement is executed, and which are not specifically altered by, or mentioned in, the agreement are part of the status quo which the parties, by implication, consider as being adopted as an essential element of the agreement. This view is termed "reasonable and logical", and its widespread endorsement as sound industrial relations practice makes it a general rule followed in the arbitration of disputes arising during the term of a contract. The reasonableness of the approach is apparent upon an understanding of collective bargaining techniques. Many items are not mentioned in a collective bargaining agreement either because of concessions at the bargaining table or because one of the parties may have considered it propitious to forego raising one subject in the hope of securing a more advantageous deal on another. Subjects traded off or foregone should under these circumstances, be as irrevocably settled as those specifically covered and settled by the agreement. To require bargaining on such subjects during midterm debases initial contract negotiations.

Attributing this totality of scope to a collective bargaining agreement comports with the meaning usually given the word modification. For example, the Board has customarily characterized the addition of a term to a contract as a modification. And, as a matter of law, modification has variously been described as: "A change; an alteration which introduced new elements into the details;" or as "to make different by change of quality;" or as "to give new form, character, force or appearance to". In view of this understanding of the term modification and in view of all the foregoing, I would find that a contract would be modified within the meaning of section 8(d) by any addition to, deletion

> from, or change in the written agreement, or by any change in the basic terms and conditions of employment existing at the time the collective bargaining agreement was executed but which were not incorporated into the written agreement.
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> Eliminating the duty to bargain in midterm concerning items not mentioned in the contract does not mean that the collective bargaining process ends with the negotiation of the contract. Day-to-day grievances and other disputes arising out of the employer-employee relationship are ever present. The settlement of these matters is part and parcel of the collective bargaining process, and it is in this regard that there remains upon the parties the continuing duty to bargain collectively. I believe that the present trend of this Board exemplified by today's decision on the subject of pensions is directly attributable, among other things, to its failure to distinguish between these two phases of collective bargaining, namely the negotiating and the carrying out of the agreement. The former has been likened to the legislative function of enacting the basic employment terms and the latter to the administrative or quasi-judicial function of applying those terms. Evaluated in this light, negotiating or legislating the basic terms of the agreement need be undertaken only periodically, usually at annual or biennial conferences mutually agreed upon by the parties. Collective bargaining during the term of the contract therefore would be mandatory only with respect to administering or interpreting the terms of the contract in accordance with the procedure outlined in the contract.

However, the difficulty in this theory lies in its relative inapplicability to present-day problems of the effect of basic entrepreneurial decisions on employee job security. It achieves stability, and even a job property right for the employee, at the expense of extreme rigidity in adjusting to market conditions, if the duty to bargain is extended to management prerogatives and strictly limited during a long-term collective agreement. Obviously there can be no settled practice defining the procedure for deciding a plant closing, relocation, sale, automation, or probably even major subcontracting and partial termination. The theory only works if it merely limits management's prerogative to directly affect existing terms of employment (such as a Christmas bonus, paid lunch hour, pension plans, and perhaps even to retiremnent as a form of discharge),

that are traditionally bargained about collectively. But of course this does not suffice for the solution of the problem of technological change and job security.

Hence the N.L.R.B., starting with Jacobs Mfg., has developed the following scheme. 26/ The parties have the right by their contract to establish both substantive terms and procedural rules for changing these terms and adherence to these as set out in the agreement will satisfy the duty to bargain. However, it is openly recognized that often the collective bargaining agreement does not reflect an express mutual agreement to regulate all facets of the relationship (despite Nash-Finch). To the extent that it does not subject the whole enterprise to the governance of collective agreed-to law, the statutory duty to bargain about this "unwritten" area continues. We leave aside for the moment the question of whether this should entail a right in the union to ask for more contractual benefits in this area but it does and should limit unilateral managerial prerogative to act without bargaining. Moreover, and this is very important, the fact that an arbitrator in interpreting the contract finds that it does not make a union grievance claim valid, because it does not limit contractually management's initiative, does not speak at all to the issue of the statutory duty to bargain before this initiative. 27/

The real debate that has arisen over the definition of the "unwritten" area of the agreement concerns the specification of its limits. As we have seen, the basic assumption in this area is that the parties have the power to make adherence to the contract sufficient satisfaction of the duty to bargain and to grant a unilateral discretion to management. This is usually referred to as a "waiver" of the duty to bargain, but it is probably more

apt to describe it as part of the whole contract, which can include both written and oral bargains. 28/ However, the Board requires that such a waiver be "clear and unmistakable" and that, as a prerequisite to such a finding, the negotiation history show that the issue has been "consciously explored" and that only then did the union grant unilateral discretion.

Two problems run through the cases. First, often in negotiation history, the union will present a proposal to management, e.g., asking for restriction of the latter's power to subcontract. When management clearly rejects this proposal, and the agreement remains silent, is this a sufficient "waiver" (as found in Nash-Finch)? 29/ The Board now appears to presume that it is not, that the negotiating history merely manifests a failure by the union to achieve a contractual, substantive limitation on management's discretion and does not of itself give rise to the inference the union intended to confer on management by contract a unilateral discretion to avoid the statutory duty. 30/ Otherwise, the Board reasons, this would artificially divert collective bargaining by giving management an incentive to reject such proposals and unions a disincentive to initiate them, because failure by the union to make a gain from the (statutory) status quo automatically causes it a loss from this same (statutory) status quo. Only where there is a conscious agreement to confer this discretion, perhaps in return for other concessions, is the statutory duty waived. A marginal case is Speidel 31/, where the company rejected a union's maintenance of privileges provision on the grounds that the bonus payment had always been and must continue to be its unilateral prerogative. The union was found to have "silently acquiesced", thus waiving the duty. (Perhaps the pre-existing practice of paying the bonus only while explicitly calling it "voluntary" made the existing condition not the substantive benefit but rather the procedure of unilaterally deciding to pay it).

A second problem is the existence in the agreement of language arguably creating a unilateral discretion. One such provision is a managerial rights clause which could be interpreted as affirmatively conferring such a discretion. Another is the "zipper" or "warp-up" clause which, by negative implication, creates such a discretion by purporting to waive the statutory duty. To neither of these is the Board too sympathetic or ready to make use of them to find a "clear and unmistakable" waiver. The first merely creates a contractual prerogative and does not necessarily create a waiver of the statute. 32/ The second is called merely a "pro forma integration" which is insufficient of itself. 33/ Moreover, the existence of specific references to an issue in the agreement (e.g., minimum rates in Beacon Piece Dyeing 34/ or severance pay in New York Mirror) 35/ or of a past practice about qualitatively different changes 36/ is insufficient, since these are evidence only of what union has or has not got by contract and not about its right to bargain over claims to which it has no legal right.

Two subsidiary points can be raised about this problem. First, where the effect on employees of unilateral changes is indirect (as for instance, job security) and where the interests of management in flexibility are important (such as regards technological changes), it is possible to give greater credence to vague negotiation history and agreement provisions in drawing the line about when and how the employer must bargain. Second, the fact of different tribunals in this area raises an important legal and policy problem about primary jurisdiction. The duty to bargain, although statutory, depends for its existence during the term of an agreement on the failure of the latter to specify either a substantive rule about existing conditions of employment or a procedure to be followed in making changes

in these conditions. The arbitrator is charged with the primary responsibility for interpreting collective agreements since it supposedly calls for his peculiar expertise and informality. However, since he cannot enforce the statutory duty to bargain, obviously the Board must play some role. Should its jurisdiction be concurrent with arbitration or sequential? If the latter, should the arbitrator have the exclusive right to determine the "open-ness" of the agreement and the limits of the "unwritten" area (and, if so, what if he does not make such a specific decision) 37/, or should the Board have the power to disagree with his decision after requiring the union to exhaust its remedies in arbitration? 38/

Once the basic framework of law is established relating to the duty to bargain over unilateral management changes during the administration of agreements, we can focus on the specific problems that have been raised, the various concrete solutions that have been proposed, and an evaluation of the whole for purposes of "transplanting" to our Canadian context.

In the first place, it appears unlikely that the scope of the duty to bargain will be confined narrowly to decisions to subcontract for labour services, decisions based only on "labour" reasons amenable to traditional collective bargaining. Rather it will be and can be extended to all types of subcontracting, to changes in work processes and operations due to technological changes, to intra-plant diversions of work and/or equipment, to plant relocation, to sales of the business, and even to plant liquidations (although the latter might be confined to closings that are partial only). there is no necessary logic to such an extension since the duty to bargain necessarily entails costs to management and society, and it is quite appropriate to limit the extension of the duty to bargain at a point where

the costs appear to be too excessive. However, the N.L.R.B. has taken the attitude that the duty to bargain should not be extended to, or withheld from, abstract, general categories of decision, for the policy reasons expressed in Ozark Trailers. 39/

With regard to plant relocation or closing, the Board argued that the employees' interests are worthy of equal protection with those of their employer and the decision to relocate or close usually has much greater impact on employees than a decision to subcontract. Matters that are amenable to collective bargaining, such as the cost, rate, and quality of production, may all be relevant to a decision to relocate as they are to one to subcontract. The employee's investment in his "working life, accumulating seniority, accruing pension rights and developing skills that may or may not be saleable to another employer", should not be rejected in favour of the employer's capital investment. The Board continued:

> The argument has been made that to compel an employer to bargain about a decision to relocate or terminate a portion of his business would significantly abridge his freedom to manage the business. In the first place, however, as we have pointed out time and time again, an employer's obligation to bargain does not include the obligation to agree, but solely to engage in a full and frank discussion with the collective bargaining representative in which a bona fide effort will be made to explore possible alternatives, if any, that may achieve a mutually satisfactory acccommodation of the interests of both the employer and the employees. If such efforts fail, the employer is wholly free to make and effectuate his decision. Hence, to compel an employer to bargain is not to deprive him of the freedom to manage his business.
>
> But, it has been argued, imposing the obligation to bargain, which includes a requirement that the bargaining be in good faith, and which precludes unilateral action absent sufficient bargaining, all subject to the surveillance of this Board, and ultimately of the courts, so impedes management flexibility in meeting business opportunities and exigencies that the statute ought not be interpreted to require such bargaining. As to this, however, the answers are plain. Initially, Congress made the basic policy determination in enacting the National Labor Relations Act, that,

despite management's interest in absolute freedom to run the business as it sees fit, the interests of employers are of sufficient importance that their representatives ought be consulted in matters affecting them, and that the public interest, which includes the interests of both employers and employees, is best served by subjecting problems between labor and management to the mediating influence of collective bargaining.

Secondly, the Supreme Court held in Fibreboard, affirming our decision therein, that such limitations on absolute freedom to manage the business as are inherent in compelling bargaining on contracting out are justified by the potential gains of requiring bargaining. If this is true with respect to decisions regarding contracting out, we think it is a fortiori true with respect to decisions regarding the relocation or termination of a portion of the business. Decisions as to contracting out are not infrequent. To require bargaining as to such decisions does arguably impose certain constraints on management in the normal operation of the enterprise (ameliorated, of course, by management's freedom to negotiate arrangements concerning the future contracting out of work as the need arises). Yet, it is plain, bargaining over contracting out is required. Decisions whether to relocate or terminate a portion of the business surely arise with less frequency in the life of the typical corporate enterprise than decisions whether to contract out certain work. Indeed, such decisions are extremely rare for most employers. Hence, to require bargaining over these decisions appears, if anything, less of a limitation on management flexibility in running the business than to require bargaining about contracting out. Accordingly, we think it no significant intrusion on management freedom to run the business to require that an employer— once he has reached the point of thinking seriously about taking such an extraordinary step as relocating or terminating a portion of the business— discuss that step with the bargaining representative of the employees who will be affected by his decision. Furthermore, such limitation on absolute employer freedom as is involved in imposing a bargaining requirement is amply justified by the interest of the employees in being consulted about a decision with profound impact on them, and by the public interest in industrial peace. Cf. Wiley v. Livingstone.

It has been contended, however, that issues of contracting out, plant removal or shutdown are impossible of resolution by collective bargaining, that there is an irreconcilable conflict between the demands which bargaining representatives are compelled—by internal political necessities—to make, on the one hand, the competitive and managerial necessities which employers are compelled to follow, on the other. Hence, it is urged, these matters must by a narrow construction of the law be committed to the sole discretion of employers as an unconditional management prerogative.

The conduct and experience of a growing number of employers and unions attest to the complexity and difficulty of such problems,

> but prove contrary to the above claim, that they can be and are resolved, and support the rationale of our decisions that such matters properly come within the scope of the bargaining obligation under the Act.

Pragmatic arguments such as these are the only effective means of deciding whether the gains from collective bargaining will justify the costs. "Theological" considerations, such as the residual rights theory, will not be helpful.

However, the Board has not gone to the other extreme and required adherence to an abstract duty to bargain that is applicable by itself with no regard to mitigating circumstances derived from the functional purpose of the legal duty. Rather, very early in its administration of the Fibreboard doctrine, the Board, in the Shell Oil case 40/, made the following important pronouncement about the elaboration and development of its Fibreboard doctrine:

> The principles of these earlier cases, however, are not meant to be hard and fast rules to be mechanically applied irrespective of the circumstances of the case. In applying these principles, we are mindful that the possibility of unilateral subcontracting will be determined by a consideration of the setting of each case. Thus, the amount of time and discussion required to satisfy the statutory obligation to 'meet at reasonable times and confer in good faith' may vary with the character of the subcontracting, the impact on employees, and the exigencies of the particular business situation involved. In short, the principles in this area are not, nor are they intended to be, inflexibly rigid in application.

Soon thereafter, in its Westinghouse 41/ decision, it based its decision on the following circumstances:

> In sum - bearing in mind particularly that the recurrent contracting out of work here in question was motivated solely by economic considerations; that it comported with the traditional methods by which the Respondent conducted its business operations; that it did not during the period here in question vary significantly

> in kind or degree from what had been customary under past established practice; that it had no demonstrable adverse impact on employees in the unit; and that the Union had the opportunity to bargain about changes in existing subcontracting practices at general negotiating meetings - for all these reasons cumulatively, we conclude that Respondent did not violate its statutory bargaining obligation by failing to invite union participation in individual subcontracting decisions.
>
> Finding, as we do, that Respondent did not violate 8(a)(5) and (1) as alleged, we shall dismiss the complaint.

Assuming that the law defining the duty to bargain should reflect functional limitations, the first and most obvious is that the decision to implement a change in working conditions must have some adverse effect on the interests of the employees, or what the Board has called a "significant detriment". There have been many decisions that have articulated this threshold requirement, which is the most important substitute for the process of distinguishing categories of decisions. The reasoning behind the requirement is obvious. Bargaining always entails costs, which can be quite onerous in the area of management changes in operations. To the extent that these costs cannot be justified by gains to be achieved, there should be no legal requirement that there be these costs. Since the purpose of collective bargaining is to give employees a chance to participate in the formulation of decisions affecting their interests, and to negotiate for alternatives that best preserve these interests, this legal technique is only necessary where such interests will be adversely affected by the decision.

More difficult is the definition of precisely those adverse effects that will be included in the term "significant detriment". A definition of the latter was attempted in Westinghouse Electric (Mansfield) 42/ where it was said that the contracting out must have "been a departure from previously

established operating practices, effected a change in conditions of employment, or resulted in a significant impairment of job tenure, employment security, or reasonably anticipated work opportunities for those in the bargaining unit". Now it is obvious that the loss of jobs by members of the bargaining unit is going to be the most important "significant detriment" from the management initiative. Hence it has been held that the loss of even one job in the bargaining unit will be sufficient. 43/ Similarly, there is no doubt that reductions in regular hours worked will be a sufficient adverse effect but there is some doubt that loss of overtime will suffice. This was held inadequate in Kennecott Copper & General Tube 44/, but in Cities Service Oil 45/, where there was a very well established system of regular overtime, loss of such overtime required bargaining over the management decision. It is obvious that the employees are interested in overtime opportunities and will feel the effects of its loss. However, the rules defining the legal duty to bargain must be "self-applied" by the employer at the risk of a substantial back-pay award if he guesses wrong. 46/ Hence, there is much to be said for drastically limiting the incidence of this factor, at least where any reasonable speculation at all is available concerning overtime opportunities being part of "existing working conditions".

Again, there is no doubt that the availability of unit employees on lay off, who are not recalled because of management's decision, will constitute a detriment. 47/ However, there must be very adequate proof of their availability and sufficient skill before the employer is required to bargain. 48/ By contrast, it has been held, where craft employees have already been placed on lower-rated production or labour jobs, that the subsequent subcontracting of work that they could have done at higher rates, is

insufficient detriment. 49/ In conclusion, if the status of employees now employed is overtly changed, this quickly constitutes "adverse effects", but the effect on prospective work opportunities must be striking to entail a duty to bargain.

The most important problem in the area of reasonably expected work opportunities occurs where employees in the unit are working at capacity with no loss of overtime higher rates, or recall from lay-off, but the effect of subcontracting is to prevent expansion of the unit. The Board has clearly held 50/ that such failure to expand the unit is not a detriment. In General Motors 51/ they held that complete elimination of the unit was not a detriment where all the employees found equal substitute jobs in the plant. However, the D.C. Court of Appeals reversed the Board 52/ finding that reduction of jobs in the unit required bargaining. The logic of this seemingly extends to the failure to increase the capacity of unit. The policy depends on a choice between protecting the institutional position and interests of the union (since there is no immediate impact on the employees) and protecting managerial flexibility where this does not immediately harm its employees.

A second threshold requirement is that the employer still be under a duty to bargain despite past practice and negotiation history. If the type of subcontracting job in question is one that, historically, has been subcontracted unilaterally, then failure to give notice and bargain about any instant contract will not be a breach of duty. 53/ This means, of course, that the instant job is one that comes within the type-situation constituted by the past practice (which may be defined as closely as "limited maintenance work" as in Shell Oil Co.). 54/ Needless to say, there must

be sufficient continuous history to constitute "past practice" and, in Allied Chemical 55/, one previous instance was held not enough. The logic of this exemption is obvious. Only unilateral changes in existing working conditions need be bargained over. If there is a history of subcontracting, then the unavailability (or the sporadic character) of this work becomes part of the present expectations of the employees, and the unilateral discretion of management vis-à-vis this problem becomes a "procedure" that is part of the accepted "terms and conditions of employment". Of course, failure to bargain on request about the continued existence of such a general practice would be illegal (even during the term of an agreement that does not explicitly confer it). 56/

Besides past practice, an agreement may expressly or by implication confer such a unilateral discretion on the employer to make these decisions. Although such a waiver of the duty to bargain must be "clear and unmistakable" and is not to be inferred merely from the proposal and rejection of contractual limitations 57/, the Board is much readier to draw the line in favour of a unilateral right free of bargaining in this area, based on negotiating history and contract terms. For instance, in International Shoe Co. 58/, a clause gave management "sole right to decide the processes of operation". In Druwhit Metal Products 59/, the clause added to this the right "to lay off employees because of lack of work". Each held to constitute the bargain about the manner in which such decisions were to be made during the term of the agreement and to have conferred unilateral power on management. Neither of these would likely be the case if used for changes in bonuses, wash-up time, etc. However, as was seen earlier about management rights clauses, warp-up or zipper clauses, severance pay, etc., there is still a difference recognized between bargaining about the

contractual right to make a unilateral decision and the statutory duty to make this decision without notice or negotiation.

Even if these two threshold requirements are fulfilled and a prima facie duty to bargain does arise, there may be aspects of the situation or of the conduct of the parties that justify (or excuse) the defendant's failure to bargain. The fact that the duty to bargain over unilateral change was not absolute was recognized earlier by the Supreme Court in the N.L.R.B. v. Katz case. 60/ It has come to the fore as a factor in the managerial prerogative situations where the costs of a duty to bargain may be so onerous. Recognizing the fact that there are these costs, various factors may exist to rebut the prima facie existence of the duty.

In the first place, the objective economic conditions facing the employer may be of such a type as to lead to the conclusion that no other decision was feasible and thus enforcing the duty to bargain would be useless. (The Board might find a technical breach but then fail to give any remedial order because no purpose is served by the latter). 61/ It may be proved that the particular change was part of an established pattern of changes in the industry and was required of him for important competitive reasons. This is not to say that even the shutting down of operations for economic reasons need never be bargained about. The cost of negotiations may not be high, the union might be able to suggest alternatives (a probability of this is not necessary) and in any event, this renders easier the performance of the remaining duty to bargain about the effects of the decision. 62/ However, the low cost of negotiations may be exacerbated by recent changes in economic conditions, requiring an immediate response even up to and including shut-down, and the duty to bargain may be excused.

Another excusing factor may be some previous negotiations with the union about the general question, perhaps including some intimation of future union intentions, together with a relatively unhelpful union response and/or some lack of interest on the part of the union in the instant case. The factor of prior negotiations (and/or readiness to talk about effects) was utilized in Shell Oil Company 63/ and New York Mirror 64/ and lack of real union interest was referred to in Koffman Assn. 65/, Young Motor Service 66/, and McLoughlin Mfg. Co. 67/ In effect, the law seems to be relaxing the relatively stringent rules relating to notice and performance of bargaining in this area where the costs may be greater and the gain less. The Board is even allowing decisions to be taken and then bargained about while still executory and saying that this satisfies the duty as long as the decision is not final and irrevocable. 68/

All this points to some relaxation of the requirements of an impasse in bargaining before the change can be made. Where the effect of the change is indirect and on job security, and where a contract is already in existence, the requirements of the duty to bargain will be differentiated from those for normal "terms and conditions of employment", especially during general "interest" negotiations. The Board tacitly recognized this in General Motors 69/ (although the D.C. Court failed to appreciate the point) and it was aptly spelled out in the following statement from the Fourth Circuit in Allied Chemical (U.M.W. v. N.L.R.B.): 70/

> But just as we indicate our understanding of the employees' fears, the employer's position must also be considered. Where a company, during the life of a collective bargaining agreement, finds it economically desirable in the normal course of business to subcontract certain work, it may be exceedingly impractical to compel costly and sometimes frustrating negotiations at the collective bargaining table to the point of impasse, as is the practice in the

initial negotiation of a collective bargaining agreement. If bargaining in the conventional sense were required, as the union contends, the employer might be obligated to attend numerous meetings with the union to discuss offers and counter-offers, to furnish pertinent financial data upon which it bases its proposed decision, to haggle with the union over the proper interpretation of the financial sheets - and it would have to bargain to an "impasse". In this view, then and only then would the employer be free to implement its decision. Full-scale collective bargaining in this context seems indeed burdensome and inappropriate, though admittedly a duty to bargain in good faith continues during the life of the agreement. See American Oil Co.

It would be an invaluable service to management and labor to develop appropriate procedures to deal with subcontracting issues arising from time to time during the life of a collective bargaining agreement. Negotiations of this type should not be the same as bargaining for contract. They need not be as formal or extensive, but some form of negotiation is likely to be needed in the interest of industrial peace during the life of the agreement. This the Board seems to have perceived in its opinion in Shell Oil Co.:

> "***(W)e are mindful that the permissibility of unilateral subcontracting will be determined by a consideration of the setting in each case. Thus, the amount of time and discussion required to satisfy the statutory obligation 'to meet at reasonable times and confer in good faith' may vary with the character of the subcontracting, the impact on employees, and the exigencies of the particular business situation involved".

Situations may and often do arise during the life of a collective bargaining contract in which the duty to "bargain in good faith" may be satisfied by something less than full-scale bargaining. An employer may be obliged under the compulsion of some circumstances to make subcontracting decisions without delay. Emergencies could arise that require immediate action. The employer's prerogative in this class of cases should be respected without requiring prior bargaining or even notification of the union. However, other contracting decisions may not demand immediate action, and respecting these types of decisions, there may be no practical obstacle to notification of the union, and to affording it an opportunity to be heard.

By notification and discussion, however, we mean an alternative in appropriate cases to full-scale collective bargaining. The union should not be permitted to stall the company's decision by insistence on protracted negotiations. The company should be permitted, after listening to the union's suggestions, to accept or reject them as its economic judgment dictates. But this does not mean that ordinarily the employer should act without giving notice and an opportunity for exchange of ideas.

THE DIRECTION FOR REFORM IN CANADA

A brief summary of this legal regime should show its consistency with our earlier theoretical discussion. The national labour policy requires collective bargaining, with a majority representative, as the means of resolving differences between employer and employees. Such a duty to bargain is not adhered to by unilateral employer changes in working conditions without notice to, and negotiation with, the union. Even unilateral decisions traditionally within the exclusive "managerial prerogative" (such as subcontracting, relocation, plant closing, technological changes, etc.), must first require bargaining because of their recognized effect on employee interests. The existence of a collective agreement may change the nature of the duty to bargain to the extent that there is in fact an agreement about the decision at issue. However, it must frankly be recognized that the parties do not agree about everything and that, ordinarily, arbitrators will grant no remedy unless based on a principle that is actually agreed to by both parties. This leaves an open or "unwritten" area in the relationship in which the pre-existing duty to bargain continues to operate. The administration of this duty to bargain is a much more appropriate vehicle for dealing with the labour relations problem of changing conditions during the term of a collective agreement.

The duty to bargain should be intelligently and flexibly elaborated in this area so as best to reconcile the competing interests of both employer and employee. Hence, it should extend only to types of decisions that pose a substantial threat to the employees' position and about which bargaining is likely to be fruitful. A sophisticated definition of "changed working conditions" should be adopted which recognizes that, if employer decisions are in conformity with "past practice", then what appears to be change may

be perfectly in accord with legitimate, employee expectations about work available for them. Finally, the type of bargaining required should be adjusted to the fact that it occurs within the term of the collective agreement and thus the definition of "impasse" and "necessity" should perhaps differ from their meaning in the context of full-scale negotiation of the collective agreement.

It might be appropriate to specify in legislation the minimum period of notice that must be given to unions of any changes in working conditions that are bargainable. Three months is sometimes suggested as an appropriate interval before the decision is implemented. As stated previously, the objective in the law is to require bargaining not only about the effects of the change but also about the decision itself to institute the change in the operation. Hence, theoretically, notice should not be of an impending change that is presented as a fait accompli. Unions are to be treated as a body with a right to participate in the determination of policies that affect the employees they represent. However, while notice before implementation may well be an enforceable duty, the subtle aspects of the problem perhaps require a more indirect influence.

This brings us to the general issue of the most appropriate means of implementing and enforcing this duty to bargain. One objection must first be attended to. It might be said of this bargaining scheme, as has been said of the general duty to bargain, that the remedial or enforcement problems create a dilemma for the law. On the one hand, the paper requirement to bargain before implementation is so vague as to be easily evaded by any employer who so wishes (by giving notice but then merely "talking"). On the other hand, if the government intervenes to force meaningful bargaining in any specific

case where evasion is sought, it can only do so by almost forcing a particular agreed-to resolution of the problem (and we have "hidden" governmental dictation of collective agreement terms).

One answer to this dilemma has been suggested. 71/ While admittedly the duty to bargain can be evaded by any employer determined to do so, still it proves very effective as a general legislative direction which is then, by and large, voluntarily adhered to. Meaningful bargaining (resulting in some agreement) can then be achieved in most cases without undesirable governmental control of the substantive terms. The psychological process by which the law achieves its results has been characterized as follows: "many a man has become a good man as a result of a life of hypocrisy". 72/ Merely requiring an employer to give notice of his impending decision and then sit down and talk about it, will have the effect of gradually changing an "empty discussion" into a "bona fide exchange of ideas leading to mutual persuasion". 73/ This is true particularly if unions prove to be "responsible" bargainers, as seen from the perspective of management. It should be noted that union responsibility will be enhanced by government policies that enable unions to acquiesce in changes necessary for competitive reasons by ensuring that any dislocation to affected employees is temporary and minimal. In any event, while important, the remedial issues are subsidiary to the merits of the substantive legal structure proposed.

When we turn to remedies, we find a field little explored in legal research 74/, and the conclusions reached are largely intuitive. It does seem, though, that one of the chief drawbacks in the Canadian "duty to bargain" concept is the concentration on prosecution as the most significant remedy. 75/ There is an understandable reluctance on either party to exacerbate a continuing collective bargaining relationship by subjecting the other

to criminal penalties. There is a tendency to strictly limit the occasions when such a draconian penalty is used, to instances of conduct obviously incompatible with minimum standards of collective bargaining. Hence, when we come to extend the duty to bargain into the period where a collective agreement exists, we must also remove this disincentive to the use and creative development of the institution. (Nor should we burden bargaining here with the impediments of the conciliation process.)

There are several alternative possibilities, some of which are now used by the N.L.R.B. First, the Board can issue an order to bargain about the decision (to "unmake" it) or about its effects on the employees. Since this merely particularizes the pre-existing legal duty, and since it is unlikely to change the status quo through bargaining once the decision has been implemented, other remedies are more appropriate. A second possibility is to grant back-pay awards and/or reinstatement without regard to the results of bargaining about effects. This award is the one in the United States that is usual. A problem stems from the difficulty of computing the relevant date on which the computation of the monetary penalty (from the time of first adverse effects) is to end. This is solved if a third, more drastic, remedy is adopted—that of requiring restoration of the status quo before the illegal unilateral change. This was adopted in Fibreboard where, as we have seen, there was little or no difficulty in requiring the change back to the original operation. Where, however, this does become onerous (as in Ozark Trailers 76/, where the necessary machinery had been sold or shipped away, or as in American Mfg. of Texas 77/, where the trucks had been sold and a reinvestment of $150,000 would be required), or where economic conditions rendered any other decision unlikely and change-back undesirable 78/, only the back pay award was required. In such a case, back pay may be computed

up to the date of the hearing 79/ or up to the end of the ordered bargaining, in agreement, impasse, etc. 80/

Another problem about this legal regime of collective bargaining concerns the ability of the union to wield sufficient power to make bargaining meaningful. For a very significant reason, this final problem is particularly critical in Canada. As I suggested earlier, the Canadian concept of the "duty to bargain" is peculiarly underdeveloped. Yet the proposal is that we solve our problems by transplanting to this context a part of a highly complex and differentiated United States doctrine. While I believe that the enactment of a legislative requirement of bargaining is desirable as a substantive measure, I am not sanguine about its prospective effectiveness, in so far as this rests on elaboration and enforcement by a Labour Board which has little experience with it. The goal of relieving labour arbitration of an unmanageable task is not well served by imposing the same burden on another body. Primary reliance must thus be placed on measures of private self-help to achieve any meaningful change in patterns of industrial relations behaviour.

As I said earlier, I am not sure to what extent official enforcement of the duty to bargain will be needed. I believe that the very statement in the law of prima facie requirements of notice and discussion (to an appropriate conclusion or "impasse") would afford significant protection to job security (and, probably, much more than can be effectively obtained via arbitration). However, there remains the real possibility that bargaining can be reduced to a charade, and employee participation in decisions affecting their destiny be rendered meaningless, if the employer faces no effective sanction for failure to agree (and officially-administered penalties for failing to bargain

are not an effective sanction). On the other hand, to require by law agreement before any changes can be instituted would be to give the unions a veto power and require the purchase of their consents in what amounts, in effect, to a monopoly-seller situation.

There are two obvious alternatives to the granting of such unilateral power to either management or union when negotiation fails to result in agreement. The first is resort to economic warfare, to the strike or lockout, which is the perfectly legitimate and normal way such disagreements are usually resolved. In effect, each of the parties is seeking to demonstrate to the other that failure to agree will be economically more costly to the other party than agreeing on the terms it proposes. The second solution is the use of compulsory arbitration or some other form of governmental regulation (general or ad hoc) to resolve the problem for the parties by imposing a result if they cannot agree on a result. We must choose one or the other, or a combination of both.

At the present time the strike is unavailable as a tool for resolving disagreement in negotiations because of the compulsory, absolute no-strike clause in all collective agreements. Some have proposed that all unilateral changes (not consented to by the union) be prohibited during the term of the agreement so that the union will have the power to strike over the decision when it is implemented in the "open" or negotiation period of the relationship. 81/ Others have suggested that the no-strike clause (or perhaps even all of the substantive terms of the agreement) be terminated if the company decides to institute changes in working conditions that are sufficiently major as to warrant treating the agreement as at an end. This, too, would enable the union to bargain meaningfully by allowing it to decide to strike if necessary to enforce its demands. 82/ Both of these solutions have their

costs, the first by radically limiting managerial flexibility and initiative during any long-term agreement (and deterring the signing of the latter) and the second, by subjecting management to the risk of renegotiating the whole of its bargain with the union whenever it feels it necessary to respond to changing economic circumstances.

I suggest a change in the law that I believe is much simpler but also much more subtle and flexible. I would prefer to delete the compulsory no-strike clause from the statute and leave its insertion in the agreement subject to negotiation by the parties. This is a contract benefit for the employer and there is no necessary reason why it should be provided for him by the government unless he gives up some benefit in exchange. It might be thought that provision to the employees of the quick, informal, and inexpensive remedy of arbitration for disposition of their contract remedies is such a benefit. However, as we have seen, arbitration in practice is now confined to (and is properly suited for) the adjudication of only those disputes that can be resolved by agreed-to contractual standards and these cannot in fact be said to include unilateral management power to change working conditions. Hence, if the governmental interest in stability of industrial relations requires arbitration and a compulsory no-strike clause, then fairness to union and employee require that the latter be confined by statute to strikes over disputes which the parties have agreed to have resolved through interpretation of the agreement in arbitration. However, and it is important to remember this, the employer should be enabled to purchase an absolute no-strike clause from the union just as he can and should be able to purchase from the union a waiver of his duty to bargain over unilateral changes.

I believe that the result of this more adequate equation of the arbitration and no-strike clauses would be to require the parties (in particular

the employer) to focus on the issue of what to do about unilateral changes during the term of the agreement. The reason for this is that otherwise they will be required to do so when the occasion arises, perhaps under "crisis bargaining" conditions and with the possibility of a strike or lockout hanging over their heads.

One serious problem that would be raised would concern the interpretation of a generally worded no-strike clause. Should this be interpreted as subject to a tacit limitation that it applies only to disputes "covered" 83/ by the agreement? Should the burden of explicitly inserting the effect of a contractual no-strike clause in the "unwritten" area of the agreement be placed on union or the employer? An example of the creation of such a tacit limitation is the Mastro Plastics 84/ decision which found that the contract did not prohibit strikes over employer unfair labour practices. Such a limitation could not now be justified as best representing the "intention" of the parties (or their "common purpose") since they both are aware of the problem but could not agree. The decision how such a provision should be interpreted is inevitably value-laden and will impose the costs of purchasing appropriate language via other concessions on the party who bears the affirmative burden of expression.

All of this assumes that society is not sufficiently concerned with strikes and labour unrest during the term of an agreement as to require by law the absolute no-strike clause. Several considerations support the conclusion that this may be true. First, the United States experience where no clause is required at all, shows that they are almost universally present now, although they can be and are tailored to meet the specific needs of the parties. Second, in fact, strikes during the term of the agreement are not necessarily prevented by the requiring of no-strike clauses by law. It may

well be true that the incidence of strikes would be much greater than it is should the law be different. However, the well-known theory of the "limits of the effectiveness of legal action" does suggest the incapacity of law to stem group activity to remedy deeply-felt grievances where such activity (e.g., a wildcat strike) is in fact considered a legitimate response in the circumstances (by society or by the group).

Still the decision may be made that the costs to society of instability in industrial relations, outside the general "interest" negotiation period, does demand an absolute ban on strikes during collective agreements. If "discussion" is considered inadequate protection for the employees' interests, and fairness requires the provision of another remedy, then compulsory arbitration is a possible alternative. However, it is important to note that this must be conceived of as "interest dispute" arbitration and not "grievance" arbitration. Arbitration should no longer be given the functional role of implying those ("instinct") obligations that are necessary to make the agreement "workable". Rather, we must decide whether we wish to have terms imposed on the parties in this area of the relationship, taking into account what we know of the limitations of compulsory arbitration and its unanticipated or unintended consequences on the process of free negotiation. It may be that we would confine its use only to those areas where the public has a very substantial interest in freedom from work stoppage (monopoly or oligopoly), that we would tailor the institution to grant participation to all parties interested in the subject-matter of the dispute, and to obtain information to give as intelligent a solution as possible to the "polycentric" problems involved, and that we would change the previous negotiation system in such a way as to minimize the adverse effects on it of compulsory arbitration.

All of these problems should be considered in the light of research done in the area of compulsory arbitration of "public interest" disputes. There are radical differences between this process and that of grievance arbitration. However, it would seem that problems in the area of managerial initiative and job security are substantially different from those in general "interest" disputes. While such issues as the former do not admit of solution by the elaboration and application of contractual standards, still they are much narrower, less polycentric, and more structured than the other. Hence, compulsory arbitration here may be a much more workable and rational process than the other appears to be and thus be desirable in a wider area of industry and employment. 85/ Moreover, it may be much more feasible for parties who cannot agree on a specific solution to agree on general standards concerning the criteria to be applied in compulsory arbitration to solve the problem. 86/ If this is the case, such arbitration may be brought much closer to the ordinary type of grievance arbitration, at least in its more creative side. The problems posed for arbitration do extend along a spectrum after all and the application of general theories about the proper scope of arbitration requires the exercise of sophisticated judgment about the circumstances.

CONCLUSION

The burden of the argument that I have tried to make is that creative arbitration can play a limited role in the solution of problems caused by changes during the term of the collective agreement, but that the necessary limitations on this role must be respected. I have suggested that intelligent elaboration of principles established by the agreement can solve problems necessarily left open by the draftsmen. However, the arbitrator

misuses his institutional role when he seeks to imply limitations on management's unilateral initiative in such fields as subcontracting, relocation, introduction of new work processes, etc. Although it cannot be defined with any degree of precision, there is a "middle way" between arbitral "legalism" and "activism".

The substitute I have suggested for arbitration of union-management differences concerning the latter's authority to institute changes in working conditions is collective bargaining. The present legal background in Canada constitutes a disincentive to meaningful bargaining in this area and should be changed. I have described in some detail the United States legal regime that I believe is a desirable alternative to our own. Needless to say, I do not believe collective bargaining to be a panacea. It also has a somewhat distorted perspective since parties represented at the negotiating table do not include all the "constituents" interested in the decision. More important, I believe the institution of collective bargaining is limited in its effectiveness to immediate, short-term types of dislocation. It assumes for its success governmental, fiscal and manpower policies which create sufficient aggregate demand and employee mobility so that the harmful effects of changing work conditions will be confined to the short-run in any individual case. Hence, just as arbitration requires a suitable background of collective bargaining to protect it from intolerable pressures, so does collective bargaining require adequate governmental policies that will enable the former to be "creative".

REFERENCES

1/ One might contrast this with the attitude expressed by Cox in "Reflections upon Labor Arbitration", 72 Harv. L.R. 1482, at 1491 (1959): "The costs of disagreement also affect grievance arbitration. Once a contract is executed the pressure to maintain it is so great that the arbitrator can hardly acknowledge that since here was no meeting of the minds upon the question before him, there was no contract, and therefore the parties should go back and negotiate a solution".

2/ The development, present status, and desirability of such a rule are exhaustively discussed in Schatzki, "The Employer's Unilateral Act", (1965-66), 44 Texas Law Review 470 and a Note, "Unilateral Action as a Legitimate Economic Weapon", (1962) 37 N.Y.U. L. Rev. 666.

3/ A very helpful article in understanding the framework within which the law relating to good faith bargaining is expressed is Duvin, "The Duty to Bargain: Law in Search of Policy", (1964), 64 Colum. L. Rev. 248.

4/ Hawaii Meat Co. v. N.L.R.B. (9th Cir. 1963), 47 C.C.H. L.C. 18,397.

5/ This was the effect of the Supreme Court decision in N.L.R.B. v. Borg-Warner (1958), 356 U.S. 3421. It was subjected to strong criticism, a good example being Fleming, "The Obligation to Bargain in Good Faith", from Public Policy and Collective Bargaining (Shister Aaron & Summers, ed., 1962), 60.

6/ Fibreboard Paper Products v. N.L.R.B. (1964), 379 U.S. 203.

7/ At pp. 223-26.

8/ Darlington Mfg. v. N.L.R.B. (1965), 380 U.S. 263.

9/ N.L.R.B. v. Adams Dairy Inc. (1965), 52 L.C. 16,625;
N.L.R.B. v. Royal Plating & Polishing Co. (1965), 52 L.C. 16,618.

10/ Cited above.

11/ N.L.R.B. v. American Mfg. of Texas (5th Cir.) (1965), 52 L.C. 16, 631.

12/ N.L.R.B. v. Winn-Dixie Stores (1966), 53 L.C. 11,243.
Cf. also N.L.R.B. v. Johnson Carmichael Floor Covering (9th Cir. 1966), 53 L.C. 11,507.

13/ N.L.R.B. v. Royal Plating and Polishing, cited above.

14/ Renton News Record (1962), C.C.H. N.L.R.B. 11,132.

15/ New York Mirror (1965), C.C.H. N.L.R.B. 9,200.

16/ International Shoe Co. (1965), C.C.H. N.L.R.B. 9,178.

17/ Edward Axel Koffman Associates (1964), C.C.H. N.L.R.B. 13,213; Young Motor Services (1966) C.C.H. N.L.R.B. 20,132.

18/ Cf. Note: "The Scope of Collective Bargaining" (1964-65), 74 Yale L.J. 1472.

19/ Cf. Note: "The Duty to Bargain Before Implementing Business Decisions" (1966), 54 Calif. L. Rev. 1749.

20/ Much of the literature of the development of the modern industrial corporation, and the relative autonomy obtained for management decisions, is relevant to this discussion. On the specific notion of affected "constituencies", cf. Chayes, "The Modern Corporation and the Rule of Law" in The Corporation in Modern Society 24 (ed. Mason, 1959). A very persuasive argument for the other position is made in the same volume by Rostow, "To Whom and For What Ends is Corporate Management Responsible", at 46.

21/ Cf. Timken Roller Bearing (1946), 70 N.L.R.B. 500.

22/ Set out earlier, at p. 102.

23/ N.L.R.B. v. Nash-Finch (1954), 25 C.C.H. L.C. 68,316.

24/ Supported by many academic commentators, such as Cox and Dunlop, Brown, and Wollett. The references are set out in full in Ch. I, ref. 65. As the earlier discussion showed, this is much the same position as that advocated in Mr. Justice Freedman's report.

25/ Jacobs Mfg. Co. (1951), 94 N.L.R.B. 1214, at 1231 ff.

26/ Cf. Wollett, cited in Ch. I, ref. 65.

27/ United Mine Workers, Local 9735 v. N.L.R.B. (Westmoreland Coal Case) (1958), 35 C.C.H. L.C. 71,616.

28/ Seagle, "Duty of an Employer to Bargain in Post-Contract Negotiations", (1965-66), 51 Cornell L.Q. 523. Of course this is not possible in Ontario, given the statutory requirement that the agreement be in writing. Cf. Sec. 1(c); also Canada Machinery Corp. (1961), C.C.H. L.L.R. 16,194 (O.L.R.B.).

29/ Cited above, at ref. 23.

30/ The leading case is Beacon Piece Dyeing (1958), 121 N.L.R.B. 753.

31/ (1958), 120 N.L.R.B. 733.

32/ Jacobs Mfg. Co., cited above; cf. also Fafnir Bearing (1965) C.C.H. N.L.R.B. 91391.

33/ New York Mirror, cited above, at ref. 15.

34/ Cited above, at ref. 30.

35/ Cited above, at ref. 15.

36/ Beacon Piece Dyeing, cited above at ref. 30.

37/ As happened in the Westmoreland Coal Case, cited above at ref. 27.

38/ An interesting discussion of this problem is contained in Note, (1966), 41 Indiana L.J. 455.

39/ Ozark Trailers (1967), C.C.H. N.L.R.B. 20,834; some of the circuits also remain adamant, as is shown by the 9th Cir. decision in N.L.R.B. v. Trans-Marine Navigation (1967), 300 F. 2d 933. Presumably the Supreme Court will soon resolve the impasse.

40/ Shell Oil (1964), C.C.H. N.L.R.B. 13,506.

41/ Westinghouse Electric (Mansfield) (1965), C.C.H. N.L.R.B. 9079.

42/ Westinghouse Electric (Bettis) (1965), C.C.H. N.L.R.B. 9476.

43/ Weston & Booker (1965), C.C.H. N.L.R.B. 9649.

44/ Kennecott Copper (1964), C.C.H. N.L.R.B. 13,482. General Tube (1965), C.C.H. N.L.R.B. 9196.

45/ Cities Service Oil (1966), C.C.H. N.L.R.B. 20,446.

46/ As in Cities Service, cited above.

47/ Puerto Rico Telephone (1964), C.C.H. N.L.R.B. 13, 582; enforcement refused by First Cir. (1966), 53 L.C. 11,197.

48/ Westinghouse Electric (Bettis), cited above, in ref. 42.

49/ American Oil (Neodesha) (1965) C.C.H. N.L.R.B. 9275;
Central Soya Co. (1965), C.C.H. N.L.R.B. 9268.

50/ Allied Chemical (1965) C.C.H. N.L.R.B. 9179; also Fafnir Bearing, cited in ref. 32.

51/ General Motors (1966) C.C.H. N.L.R.B. 20,355.

52/ U.A.W. v. N.L.R.B. (D.C. Circuit) (1967), 55 L.C. 11,759

53/ American Oil (Whiting) (1965) N.L.R.B. C.C.H. 9149.

54/ Shell Oil Co., cited above, in ref. 40.

55/ Allied Chemical, cited above, in ref. 50.

56/ American Oil (Whiting), cited above, in ref. 53.

57/ Adams Dairy (Cloverleaf Div.) (1964) N.L.R.B. C.C.H. 13,266.

58/ International Shoe Co., cited above, in ref. 16.

59/ Druwhit Metal Products (1965), C.C.H. N.L.R.B. 9458.

60/ (1962), 369 U.S. 736.

61/ As in New York Mirror, cited above in ref. 15.

62/ Royal Plating & Polishing (1964), C.C.H. N.L.R.B. 13,371.

63/ Shell Oil Co., cited above, in ref. 40.

64/ New York Mirror, cited above, in ref. 15.

65/ Edward Axel Koffman Associates, cited above, in ref. 17.

66/ Young Motor Service, cited above, in ref. 17.

67/ McLoughlin Mfg. Co., (1967) C.C.H. N.L.R.B. 21,285.

68/ Cf. Edward Axel Koffman, cited above, in ref. 17; Tonkin Corp. (1967), C.C.H. N.L.R.B. 21,501; Hartman (1964), C.C.H. N.L.R.B. 12,903.

69/ Cited above, in ref. 51.

70/ Allied Chemical (U.M.W. v. N.L.R.B.) (1966), 536 C. 11,149.

71/ Cf. Ross, The Government as a source of Union Power, (1965), Brown Univ. Press), is the best discussion of the whole problem of enforcing the duty to bargain.

72/ Elie Halevy, quoted in Cox, "The Duty to Bargain in Good Faith", (1958), 71 Harvard L. Rev. 1401 at 1439.

73/ Cox, ibid, at 1439.

74/ Landis, "The Study of Legislation in Law Schools", quoted in Hart and Sacks, supra, 68 at 907, makes the same suggestion about an analogous problem: "Not even a catalogue of the devices for enforcement is to be found, far less a knowledge of the fields in which they have been employed. The legislator must pick his weapons blindly from an armory of whose content he is unaware. The devices are numerous and their uses various. The criminal penalty, the civil penalty, the resort to the injunctive side of equity, the tripling of damage claims, the informer's share, the penalizing force of pure publicity, the licence as a condition of pursuing certain conduct, the confiscation of offending property-these are samples of the thousand and one devices that the ingenuity of many legislatures has produced. Their effectiveness to control one field and their ineffectiveness to control others, remains yet to be explored. Why is it that the informer's share, the traditional device of an early New England civilization, has generally disappeared from the statute books but retains its full force and vigor in the field of customs enforcement? One remembers how Lord Shaftesbury after fifteen years of employing the criminal penalty

in vain against the employment of boy chimney-sweeps, finally achieved an almost instant success by the use of licensing schemes. The stigma of unfavorable publicity, employed by Massachusetts in minimum-wage-legislation, may have an undreamed-of potency in these days when advertising is king. There are queries to which patient investigation alone can make answer".

75/ Palmer "The Myth of 'Good Faith' in Collective Bargaining" (1966), 4 Alberta Law Review 409.

76/ Cited above, in ref. 39.

77/ Cited above, in ref. 11.

78/ As in Renton News Record, cited above, in ref. 14.

79/ Royal Plating and Polishing, cited above, in ref. 13.

80/ Winn-Dixie Stores, cited above, in ref. 12.

81/ Cf. Freedman Report, cited above, in Ch. I, ref. 76.

82/ This was suggested in a speech by the Minister of Manpower and Immigration, The Honourable Jean Marchand, at the National Conference on Labour-Management Relations 41 (Ottawa, March 21-22, 1967).

83/ The meaning of the word "covered" is suggested by Cox and Dunlop, "The Duty to Bargain Collectively During the Term of an Existing Agreement", cited above in Ch. I, ref. 65, at p. 1098, fn. 3. It included:

> "terms and conditions of employment (1) which are explicitly and unambiguously spelled out in the contract; or (2) as to which there are questions of contract interpretation; or (3) which are fixed by the particularization of a general rule contained in the agreement; or (4) which must be implied to give the agreement its obvious meaning".

84/ Mastro Plastics v. N.L.R.B. (1956), 350 U.S. 264.

85/ The suggestion appears in Arthurs, "Challenge and Response in the Law of Labour Relations", in Industrial Relations: Challenges and Responses, 106-07 (1966).

86/ A distinction between "open-end" and "restricted" arbitration is suggested in Taylor, "The Voluntary Arbitration of Labour Disputes" (1951), 49 Michigan Law Review 789 at 799.

APPENDIX

ARBITRAGE ET CONVERSION INDUSTRIELLE

RESUME

Cette étude cherche d'abord à définir le rôle de l'arbitre du travail dans le règlement des problèmes que crée pendant la durée d'une convention collective le besoin croissant de changements industriels. Elle passe en revue les diverses formes d'initiatives patronales et la gamme des sentences arbitrales rendues à leur égard au Canada et aux Etats-Unis. Elle analyse les types de solution disponibles pour atténuer les répercussions nuisibles de la mutation industrielle sur les travailleurs. Il ressort que l'arbitre du travail n'apparaît guère en mesure dans ce domaine de promouvoir les solutions les plus adaptées.

La question de fond elle-même sert alors de point de départ à un examen philosophique de différentes théories sur la portée générale du rôle de l'arbitre en tant que centre de décision. L'une de ces théories est énoncée et défendue comme étant celle qui découle le mieux du contexte institutionnel et de la structure de l'arbitrage. Si l'on accepte cette conception de l'arbitre-juge, on arrive à la conclusion qu'il faut s'efforcer de restreindre les décisions arbitrales dans le domaine libre ou "non écrit" de la convention.

Comme une conclusion aussi négative n'a pas ou a peu d'utilité pour ceux dont les intérêts sont lésés par les pouvoirs conservés unilatéralement par le patronat, la neutralisation de l'arbitrage doit s'accompagner d'autres changements législatifs. La procédure appropriée pour résoudre les conflits d'intérêt dans ce domaine est la négociation collective, mais celle-ci est artificiellement entravée par la clause statutaire absolue de non-recours à la grève, contenue dans la convention. On recommande que cette clause soit supprimée et qu'il y ait pendant la durée de la convention obligation permanente de négocier les questions qui se présentent et qui n'ont pas été réglées au cours des négociations primitives. Cette procédure est beaucoup mieux à même de fournir des propositions adaptées aux besoins des parties en présence. La procédure d'arbitrage peut alors être réservée aux problèmes d'interprétation, ce pourquoi elle a été instituée.

NOTES